JUN 26 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Conditional Cross-Petitioners,

vs.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Respondents.

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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BLEED THROUGH

INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 3

Constitutional Provisions and Statutes Involved 3

Statement of the Case 4

Argument 10

Conclusion 20

Appendix

Decision of Wisconsin Supreme Court .....App. 1

Order of Wisconsin Supreme Court on Motions for Rehearing .....App. 41

Decision of Circuit Court .....App. 42

Texts of Statutes Involved .....App. 71

Authorities Cited

Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168 (1951) 12

Armstrong v. Manzo, 380 U.S. 545, 552 (1965) 15

Arnett v. Kennedy, 416 U.S. 134, 178 (1974) 13

Bell v. Burson, 402 U.S. 535, 542 (1971) 12

Board of Regents v. Roth, 408 U.S. 564, 569-570 (1972) 12

Boddie v. Connecticut, 401 U.S. 371, 379 (1971) 13, 16

PAGE

Durkin v. Board of Police & Fire Commissioners, 48 Wis.2d 112, 180 N.W. 2d 1 (1970) 19

Goss v. Lopez, ... U.S. ....., 43 U.S.L. Week 4181 (1975) 16

Jiminez v. Weinberger, ... U.S. ....., ..., 41 L.Ed.2d 363, 371 (1974) 19

Mitchell v. W. T. Grant Company, 416 U.S. 600 (1974) 17

Morrissey v. Brewer, 408 U.S. 471, 476 n.1 (1972) 12

North Georgia Finishing, Inc. v. Di-Chem, Inc., ..., U.S. ....., U.S.L. Week 4192 (1975) 17

Pickering v. Board of Education, 391 U.S. 563 (1968) 11

Withrow v. Larkin, ... U.S. ....., 43 U.S. L. Week 4459 (1975) 11

Statutes Cited

Wis. Stats.

62.13(5)(i) 19

§111.70(4)(j)(m) 18

§111.70(4)(1) 18

§111.77 18

§118.22(2) 14

BLEED THROUGH

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The respondents have filed a petition for a writ of certiorari under the heading *Hortonville Joint School District*

No. 1, et al. v. *Hortonville Education Association, et al.* in which review is sought of a decision by the Wisconsin Supreme Court which held that the conditional cross-petitioners were denied due process of law when their employment was terminated by the respondents. In the event that the Court decides to review the decision of the Wisconsin Supreme Court pursuant to the petition previously filed by the respondents, the conditional cross-petitioners pray that a writ of certiorari issue to review those aspects of the desision of the Wisconsin Supreme Court which are raised herein.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court which is the subject of the petition and conditional cross-petition is reported officially at 66 Wis. 2d 469 and unofficially at 225 N.W. 2d 658 and 88 L.R.R.M. 3075. The decision of the Circuit Court for Outagamie County, Wisconsin, which gave rise to and was reversed in the Wisconsin Supreme Court decision noted above is not officially reported, but is unofficially reported at 88 L.R.R.M. 2743.

JURISDICTION

The decision of the Wisconsin Supreme Court reversing the Circuit Court's order granting summary judgment on one cause of action and affirming its order sustaining a demurrer to another was handed down February 5, 1975. An order denying motions for rehearing filed by both sides was entered March 28, 1975. The conditional cross-petitioners do not believe that the jurisdiction of this Court can properly be invoked in that the decision reversing the trial court's grant of summary judgment is not a final judgment. However, if the Court finds that its jurisdiction is properly invoked and that it may entertain the petition

BLEED THROUGH

for a writ of certiorari previously filed by the respondents, then the same jurisdictional bases would warrant the Court's consideration of this conditional cross-petition. Under such circumstances the jurisdiction of the Court would be invoked pursuant to 28 U.S.C. §1257(3). Authority for jurisdiction to consider a conditional cross-petition for a writ of certiorari is found in *McComb* v. *Farmers Reservoir and Irrigation Co.*, 337 U.S. 755 (1949).

QUESTIONS PRESENTED

The principal question presented is whether the conditional cross-petitioners, who were found to have been denied due process of law, are entitled to restoration of their status quo until such time as due process is afforded.

Also presented is the question of whether or not Wisconsin's classification of teachers with police officers and firemen for purposes of prohibiting strike activities on their part while denying them the countervailing benefits given to police officers and firemen constitutes a denial of equal protection of the laws.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in part, as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Also involved in this case are Wisconsin Statutes §§111.70(4)(1); 111.70(4)(jm); 111.77; and 62.13(5)(i), all of which are set forth in full as part of the appendix.

STATEMENT OF THE CASE

Commencing at some time prior to March 18, 1974, the individual conditional cross-petitioners, who were teachers at the Hortonville Public Schools and were members of the Hortonville Education Association, the other conditional cross-petitioner, attempted, through the Association, to engage in collective bargaining to reach a collective bargaining agreement for the year then ending and for the next school year. Their employers were the Hortonville Joint School District No. 1, and the bargaining agent for the District was the Hortonville Board of Education. The parties were unable to reach an agreement for either year even though the teachers had been attempting to do so with respect to 1973-74 since the previous spring. The teachers, feeling that the failure to reach an agreement was due to a lack of good faith bargaining by the employers and that the employers were attempting to destroy their union, commenced a strike on March 18, 1974. (R. pp. 51, 135, 205, 206, A-Ap. pp. 142, 135)*

On March 29, 1974, the Hortonville Board of Education decided to schedule disciplinary hearings for each individual teacher who was then engaged in a work stoppage. Notices of disciplinary hearings were prepared and delivered to the Outagamie County Sheriff's Department for service on each teacher. Eleven teachers were served notices, including the day of service, four days before the scheduled hearing. Fifty-one teachers were served three days prior to the hearing. Three teachers were served one day prior to the hearing and one teacher received her notice on the day of her scheduled hearing.

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* References are to the record as paginated for the Wisconsin Supreme Court and to the Appellants' Appendix to their brief to the Wisconsin Supreme Court.

BLEED THROUGH

On the first day set for hearings, April 1, 1974, the teachers attended *en masse*. At that hearing the counsel for the teachers objected to the sufficiency and adequacy of the disciplinary hearing notices, objected to the Board of Education acting as the decisionmaker in their cases, requested the opportunity to present evidence in defense and in mitigation of punishment, made an offer of proof when that request was denied, requested and was denied the opportunity to adversely examine members of the Board, who were parties to the bargaining underlying disciplinary hearings, and protested the fact that the Board's attorney acted as both prosecutor and counsel to the decisionmaker.

At a closed meeting on April 2, 1974, the Board of Education voted to terminate the employment of the teachers. Notices of termination were then sent out. Those notices purported to terminate contracts for the 1973-74 and 1974-75 school years. Following the terminations, the Hortonville Education Association and six of the fired teachers, proceeding on behalf of a class, brought an action in Circuit Court for Outagamie County, Wisconsin against the school district, the Board of Education, the members of the Board and the administrators of the school district.

The amended complaint alleged four separate causes of action. The first cause of action challenged the action of the defendants on due process grounds. Essentially, the complaint alleged that the notice and hearing provisions afforded were inadequate to comport with the due process provisions of the fourteenth amendment to the United States Constitution. The second cause of action alleged a denial of equal protection with respect to differing treatment by the Board toward teachers who were and were not represented by the Hortonville Education Association. The third cause of action challenged the Board's action on the grounds that it was taken in violation of the Wisconsin

Open Meeting Law, §66.77, Wis. Stats. The fourth cause of action challenged the Board's action with respect to hiring replacement teachers.

The circuit court granted the respondents' motion for summary judgment with respect to the first cause of action of the complaint and sustained demurrers with respect to the second, third and fourth. The second and fourth were repled and are still pending before the circuit court. The trial court's rulings on the first and third, however, were ultimately appealed to the Wisconsin Supreme Court.

With respect to the first cause of action, the trial court examined the facts and concluded that the teachers were entitled to due process of law prior to any disciplinary action in that they had both a property interest under state law and a liberty claim. (R. pp. 132-133, A-Ap. p. 119). The court concluded, however, that in view of its belief that there could be no defense to a prohibited public employee strike, due process was easily satisfied and that the penalty of discharge was automatic. (R. pp. 136, 137, A-Ap. pp. 124, 125).

With respect to the third cause of action challenging the secret meeting of the Board of Education which resulted in the termination of the teachers' employment, the court held that the meeting was proper. The court reasoned that this type of meeting fell under two exceptions to the open meeting law and that it was proper to conduct the meeting in executive session in the absence of a request by the teachers to hold the meeting open to the public. Since the complaint did not allege that such a request had been made, the judge felt that no cause of action was stated. The court reached that conclusion despite the allegation in the teachers' complaint that they had no notice that any hearing was contemplated and despite the inference therefrom

BLEED THROUGH

that the teachers had no opportunity to request an open meeting.

On September 23, 1974, in response to an order to show cause, the Wisconsin Supreme Court heard argument on the question of whether the facts involved in the case should be the subject of an original action before the Wisconsin Supreme Court. On September 24, 1974, the petition for an original action was denied, but the court ordered that an expedited appeal be allowed. The court also allowed the teachers to present all constitutional issues involved, even though some of these issues had not been presented directly in the lower court.

The Wisconsin Supreme Court handed down a decision in the matter on February 5, 1975. With respect to the third cause of action that court affirmed the trial court's order sustaining the demurrer. No question is raised in this conditional cross-petition as a result of that portion of the court's ruling. With respect to the first cause of action, the Wisconsin Supreme Court reversed the summary judgment entered by the circuit court and remanded the case to the circuit court for further proceedings consistent with the opinion. While the court rejected several of the constitutional arguments raised by the teachers, it agreed that due process had been denied them because of a lack of a fair and impartial decisionmaker. The court held that discharge was not an automatic penalty for engaging in a prohibited public employee strike and that the penalty to be imposed, if any, had to be reasonable under the circumstances. Interpreting Wisconsin law and procedure, the Wisconsin Supreme Court found that the school board was responsible for negotiating the school district's position with the teachers and, at the same time, had the authority to impose punishment for engaging in a prohibited strike. The Wisconsin Supreme Court held that

this situation allowed the school board to conclude the bargaining process on its own terms by exercising the expedient power to discharge the teachers who were their adversaries in the negotiating process. The possession of such a weapon by one of the parties to an underlying dispute was said to create such a real risk of partiality when that party sat as a decisionmaker with respect to the other party's conduct as to violate principles of due process of law.

The court ordered the matter remanded to the trial court for hearings of a *de novo* nature in which the trial court was to decide what penalty, if any, could properly be imposed against the teachers for engaging in a prohibited strike. The court also set up a procedure for the future in cases in which teachers and school boards found themselves in adversary positions and the property or liberty interests of the teachers were at stake. In such cases the court held that upon termination a teacher could petition a court for *de novo* review of the action taken by the board.

Both parties before the Wisconsin Supreme Court moved for rehearing. The school board argued, on various grounds, that due process was either not required or had been satisfied. The teachers argued that since a violation of their rights to due process had been found, the purported discharges were of no legal effect and that they were entitled to reinstatement with a claim for back pay until such time as a meaningful hearing complying with due process requirements was held. On March 28, 1975, the Wisconsin Supreme Court denied both motions for rehearing.

Two issues are sought to be raised by the conditional cross-petitioners in the event that this Court grants the petition for a writ of certiorari filed by the school board. The first is the conditional cross-petitioners' claim of en-

titlement to reinstatement until such time as a hearing comporting with due process requirements is provided. The requests for reinstatement and back pay were raised in the original pleading to the Wisconsin Supreme Court on the appeal, that is the appellants' brief, at page 35. The same issue was the sole subject of the conditional cross-petitioners' Motion for Rehearing as appellants before the Wisconsin Supreme Court and was fully presented in the Appellants' Brief in Support of Motion for Rehearing. The Wisconsin Supreme Court never commented on reinstatement or back pay in its decision on the appeal and denied both sides' motions for rehearing without comment. The equal protection issue of the conditional cross-petitioners was raised in the Appellants' Brief and Appendix before the Wisconsin Supreme Court on pages 26-32. The court answered the claim as follows:

> "[The teachers] claim that teachers are denied equal protection because, unlike police and firemen, they are not accorded binding arbitration or other dispute settlement rights. The different treatment accorded police and firemen is 'based upon substantial distinctions which make one class really different from another.' . . . It it is not difficult to find a rational basis for the legislation. If police or firemen go on strike the eminent and immediate danger to the community is so great that every reasonable measure must be taken to get them back on the job as soon as possible, or to prevent them from striking in the first instance. The classification is not unreasonable and is a legitimate exercise of the legislative function." (p. App. 13)*

Thus, the federal questions conditionally sought to be reviewed here were timely and properly raised below so that this Court has jurisdiction to review them if jurisdiction is found in other respects.

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* References for quotations from the Wisconsin Supreme Court's decision are to the Appendix to this Conditional Cross-Petition.

ARGUMENT

The conditional cross-petitioners do not seek outright review of the Wisconsin Supreme Court's opinion by this Court through certiorari and did not take an appeal because they believe that this Court lacks jurisdiction in that the Wisconsin Supreme Court's decision is an interlocutory order reversing a lower court summary judgment and remanding the case for further proceedings. Furthermore, with respect to the Wisconsin Supreme Court's decision on the due process question raised, the decision was obviously correct, as far as it went.

Due process was denied the teachers. The highest court of the State of Wisconsin held that applicable state statutes gave them an expectation of continued public employment rising to a level of a property right and that charges of striking in violation of Wisconsin's public employee strike prohibition were such serious accusations in Wisconsin as to threaten their liberty interests. Both the circuit court and the Wisconsin Supreme Court held that as a result of the situation presented in this case and the relationship of Wisconsin law to that situation due process was required. Furthermore, the Wisconsin Supreme Court held that the local circumstances caused by applicable Wisconsin law, which placed one party to a dispute in the position of being the other party's judge for charges resulting from the same underlying dispute constituted a denial of a neutral and unbiased decision-maker and therefore denied due process of law. Whatever arguments the respondents might have had in the past to the effect that the Wisconsin Supreme Court was inappropriately applying due process decisions of this

BLEED THROUGH

Court were laid to rest with *Withrow* v. *Larkin*, —— U.S. ——, 43 U.S. L. Week 4459 (1975) which reaffirmed *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

Since the respondents have petitioned this Court for review, however, the conditional cross-petitioners seek review of the two issues previously discussed in the event that this Court decides to grant the respondents' separate petition. If the Court deems it appropriate to review the issue raised by the respondents in their own petition, then it certainly would be appropriate to review the two issues conditionally presented herein in that they are related.

The conditional cross-petitioners were fired by the respondents in April of 1974. The Wisconsin Supreme Court ultimately held that those firings denied the teachers their rights to due process of law. To correct such a problem in the future, the court devised and judicially ordered a hearing procedure involving *de novo* judicial review of teacher terminations in those situations in which liberty interests are involved and the school board occupies an adversary position to the teacher. However, no specific immediate relief was given to the teachers who secured that ruling and, since the Wisconsin Supreme Court has stayed its mandate and the remand to the trial court pending the school board's petition for review from this Court, the deprivation of constitutional rights found to exist continues to today, well over a year since the original unconstitutional action. The conditional cross-petitioners were denied due process of law and they are entitled to a remedy which has the effect of correcting that denial. They are entitled to an impartial decisionmaker in the first instance. Since they have not had one, the effects of the prior deprivation of rights must be remedied. They are entitled to

reinstatement and back pay until they are provided with due process.

This Court has consistently held that a hearing comporting with due process requirements must be held before the termination of any rights subject to procedural due process protections.

> "While 'many controversies have raged about . . . the due process clause', *Ibid.*, it is fundamental that except in emergency situations (and this is not one) due process requires that when a state seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective. *Ibid. Opp Cotton Mills* v. *Administrator*, 312 U.S. 152-156; *Snaidach* v. *Family Finance Corp.*, [395 U.S. 337 (1969)]; *Goldberg* v. *Kelly*, [397 U.S. 254 (1970)]; *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971)." *Bell* v. *Burson*, 402 U.S. 535, 542 (1971). (Emphasis in the original).
>
> "The right to be heard *before* being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). (Emphasis supplied).
>
> "When protected interests are implicated the right to some kind of *prior* hearing is paramount." *Board of Regents* v. *Roth*, 408 U.S. 564, 569-570 (1972). (Emphasis supplied).
>
> "The hearing required by due process, as defined herein, must be accorded *before* the effective decision." *Morrissey* v. *Brewer*, 408 U.S. 471, 476 n.1 (1972). (Emphasis in the original).

Since there has yet to be a hearing which satisfies due process requirements in this case, as the Wisconsin Supreme Court has determined, the action taken with respect

to the appellants' teaching positions is unconstitutional and must be vacated.

While the formality and specific requisites for a hearing may vary under circumstances involved in different cases, and the importance of the interests concerned therein, the requirements that due process be met prior to effective termination of employment cannot be waived.

> "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interests, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." (*Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971). (Emphasis in the original).*

Simply, the hearing which must be afforded must be given before the termination becomes effective. In this case, that

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* This is clearly not a situation where some valid governmental interest justifies postponing the hearing until after the event. While the school board certainly had a legitimate interest in resuming school operations, there was nothing in that interest that required termination of the teachers' employment. As pointed out by the Wisconsin Supreme Court, the school board could have sought injunctive relief and could have intensified bargaining efforts. The firings were accomplished solely to punish the teachers, which is something the board cannot properly do. In any event, even when there is an extraordinary situation justifying the government's action prior to the hearing,

> "a principal rationale has been that a hearing would be provided before the taking became final. See *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908) (Seizure of food unfit for consumption); *Central Trust Co.* v. *Garvan*, 254 U.S. 554 (1921) (Seizure of property under trading with the enemy act). . . ." *Arnett* v. *Kennedy*, 416 U.S. 134, 178 (1974) (White, J., concurring in part and dissenting in part).

hearing has yet to be given. Therefore, the terminations are not effective and this Court should say so.

What the Wisconsin Supreme Court said appears to be inconsistent with the rest of its decision. In attempting to construe §118.22(2), Wis. Stats., in a fashion to meet a valid constitutional objection, that court held that the board should make initial determinations with respect to hiring or firing of teachers. It added that when due process is required, a notice, a hearing and a statement of reasons should be given, presumably prior to the taking. With respect to the situation at bar, however, the court stated:

> "In those situations where an employed teacher is discharged or otherwise disciplined and due process is required, and the school board is in an adversary position, we hereby provide and direct that the dissatisfied teacher or teachers can, upon petition, obtain a *de novo* determination of all issues in any court of record in the county where the school district or part of it is located." (p. App. 28)

As the teachers read the above quoted statement, it is at least arguable that the Wisconsin court is saying that due process need not be afforded in the first instance. Such is totally inconsistent not only with the rulings of this Court quoted above, but also with the Wisconsin court's previous language in its decision. The ruling possibly allows the unconstitutional termination to stand and puts the burden on the individual whose rights have been violated to reverse that error by an affirmative act. If that is a correct interpretation of what the court intended, then it is respectfully submitted that the remedy afforded by the court violates due process in and of itself.

> "A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis* v. *Ordean*, 234 U.S.

> 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the *petitioner to the position that he would have occupied had due process of law been accorded to him in the first place.*" *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). (Emphasis added).

This is not to suggest that the Wisconsin Supreme Court was powerless to create a remedy under the circumstances. The remedy created does not go far enough. If that Court felt that it was essential for the school board to actually make a determination on discipline or discharge to initiate the proceedings, then perhaps the appropriate program would have been to direct the board to proceed as follows: In those situations where an employed teacher is sought to be discharged or disciplined, due process is required, and the school board is in an adversary position, the board should notify the teacher of its *intentions* and inform the teacher that if he objects he need merely say so and the board will have the burden of seeking approval of its proposed conduct by a court of record in the county where the school district or a part of it is located *prior to imposition of such punishment.* In those situations where the continued presence of the teacher in the school constitutes a threat to the students, the board could seek an order in the nature of a temporary restraining order from the court which would have the effect of suspending the teacher, with pay, until such time as a constitutionally antiseptic hearing could be held.

To place the burden on the employee to seek *de novo* review subsequent to the board's determination to discharge

could not conceivably come close to satisfying constitutional requirements unless the hearing were, in fact, *de novo.* That is, once the discharged employee demanded a *de novo* review the status quo would be restored prior to the hearing. All prior proceedings would be vacated at once. He would be restored to his position, and entitled to his wages, unless and until the independent decision maker acted adversely to him. Applying that standard to this case, it would mean that the teachers, who filed this lawsuit on April 5, 1974, were entitled to reinstatement from at least that date.

Any remedy upon a finding of improper discharge which does not reinstate the improperly discharged employee to his original status until such time as constitutionally permissible steps are conducted does not satisfy the constitutional requirements. As emphasized in *Boddie* v. *Connecticut,* 401 U.S. 371 (1971), at p. 378:

> "What the constitution does require is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,' *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965) (Emphasis added). . . ."

If the unconstitutional discharge here is allowed to stand until a proper hearing is afforded, with the resultant continuation of the employees' deprivation, the later hearing is not "at a meaningful time and in a meaningful manner." For the subsequent hearing to be "meaningful", all results of the prior unconstitutional hearing must be vacated and set aside.

In *Goss* v. *Lopez,* ..... U.S. ....., 43 U.S.L. Week 4181 (1975), this Court held that minimum due process was required *before* a student could be compelled to suffer a ten day suspension from school. More elaborate hearing procedures would probably be required, according to the ma-

BLEED THROUGH

jority opinion, if a more substantial deprivation of property or liberty were involved. Obviously, discharge is about as substantial a deprivation of property and liberty as can be imposed against teachers. With respect to the availability of *de novo* review, this Court held that such review, even if available, was inadequate.

> "Appellants point to the fact that some process is provided under Ohio law by way of judicial review. Ohio Rev. Code §2501.06. Appellants do not cite any case in which this general administrative review statute has been used to appeal from a disciplinary decision by a school official. If it be assumed that it could be so used, it is for two reasons insufficient to save inadequate procedures at the school level. First, although new proof may be offered in a §2501.06 proceeding [citing cases], the proceeding is not *de novo*. . . . Thus, the decision by the school—even if made upon inadequate procedures—is entitled to weight in the court proceeding. Second, without a demonstration to the contrary, we must assume that delay will attend any §2501.06 proceeding, that the suspension will not be stayed pending hearing, and that the student meanwhile will irreparably lose his educational benefits." U.S.L. Week at 4186 n. 10.

Even a corporation in a garnishment action is entitled to more than the conditional cross-petitioners have received in this case. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, ... U.S. ....., 43 U.S.L. Week 4192 (1975), stands for the proposition that a corporation's right to due process of law was violated by a state statute allowing garnishment of its bank account, thereby depriving it of the use of its property during the course of litigation, since there was no provision for an early hearing. The recent decision of *Mitchell* v. *W. T. Grant Company*, 416 U.S. 600 (1974) was distinguished because in *Mitchell* the state statute involved compelled an immediate hearing be-

fore a neutral decision maker after seizure and dismissal of an attachment in the absence of creditor proof of grounds therefor.

In this case the conditional cross-petitioners have had both their property and liberty interests substantially interfered with for well over a year, and that interference continues through this litigation, even though it has already been determined that their rights to due process of law have been violated. The only way such deprivations can be corrected at this stage is with back pay and reinstatement until such time as any attempt to terminate the teachers' employment comports with the requirements of due process of law.

Should this Court decide to review the issues raised by the respondents in their own petition, the conditional cross-petitioners ask that the Court also review the Wisconsin Supreme Court's treatment of the equal protection claim raised by the teachers. They are denied equal protection by the Wisconsin statutory procedure.

Section 111.70(4)(1), Wis. Stats., prohibits strikes by all county and municipal employees. The statute makes no distinctions with respect to the degree, if any, of the relationship between the function of employees and the health and safety of the communities within the state. Teachers are not policemen, firemen or public health employees. Yet they are prohibited from striking as though their function were equivalent to those employees who are entrusted with protection of the public. At the same time, however, they are also denied concomitant benefits that are provided to the police and firemen.

Section 111.70(4)(j)(m), Wis. Stats., grants the right of binding arbitration to members of the Milwaukee Police Department. Section 111.77, Wis. Stats., provides for bind-

BLEED THROUGH

ing arbitration for fire departments and city and county law enforcement agencies, with few exceptions. Section 62.13(5)(i) allows *de novo* judicial review of the reasonableness of disciplinary proceedings against police and firemen, including *de novo* review of the reasonableness of any penalties imposed. *Durkin* v. *Board of Police & Fire Commissioners,* 48 Wis.2d 112, 180 N.W. 2d 1 (1970). Thus, not only are teachers forced into a class which they don't deserve to be in, but even within that class they are discriminated against.

What is created is two subclasses within one class, with differing treatment for the subclasses. The subclass consisting of police and fire departments is given the right to binding arbitration in return for being denied a right to strike. The members of the subclass are also given the right to *de novo* judicial review of the reasonableness of any penalty if they are charged with striking despite the prohibition. The other subclass, which includes teachers and others whose function is not essential to the health and safety of the citizenry, is denied the right to strike, the right to binding arbitration and the right of *de novo* review of penalty. As stated in *Jiminez* v. *Weinberger,* ..... U.S. ....., ..., 41 L.Ed.2d 363, 371 (1974):

> "[T]o conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the law guaranteed by the due process provisions of the Fifth Amendment. Schneider v. Rusk, 377 U.S. 163, 168; Bolling v. Sharp, 347 U.S. 497, 499."

The only way the equal protection clause could be satisfied with respect to different treatment among the subclasses is to suggest that policemen and firemen are entitled to binding arbitration and *de novo* judicial review of penalties imposed because their function is essential to the health and safety of the citizens whereas the teachers' is not. This might create a rational relationship between

the classification of police and firemen separately from other public employes and the object sought to be achieved, that is, the safety and health of the citizens. But recognition of that fact requires recognition of its corollary, that the ban on striking by public employes who are *not* essential to the health and safety of the citizenry does *not* bear a rational relationship to protecting the health and safety of the citizenry. Simply stated, the state cannot have it both ways and propose to satisfy equal protection on both levels. Consequently, to satisfy equal protection requirements, this Court must either hold the strike ban inapplicable to nonessential public employes like teachers or direct that they be given the benefits of binding arbitration and *de novo* review of punishment as well.

CONCLUSION

The conditional cross-petitioners believe that the Wisconsin Supreme Court correctly ruled on their process claim, as far as the court went. While it is doubtful whether this Court has jurisdiction to review the decision of the Wisconsin Supreme Court in any respect, if the Court finds that it can and should review the issue raised by the respondents in their own petition, then the teachers request that the Court also grant this conditional cross-petition for a writ of certiorari and consider the issues raised by both sides.

Respectfully submitted

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APPENDIX

APPENDIX

APPENDIX

NO. 635
August Term, 1974

STATE OF WISCONSIN: IN SUPREME COURT

HORTONVILLE EDUCATION ASSN., et al.,
Appellants,

v.

HORTONVILLE JOINT SCHOOL DISTRICT No. 1, et al,
Respondents.

APPEAL from a judgment and an order of the circuit court for Outagamie county: ALLAN J. DEEHR, Circuit Judge of the Fourth circuit, Presiding. *Judgment reversed, order affirmed.*

This is a class action which grew out of a municipal labor dispute at Hortonville, Wisconsin, involving on one side the public school teachers in the Hortonville Joint School District No. 1 and their representative and bargaining agent, the Hortonville Education Association (HEA), and on the other side the Hortonville Joint School District No. 1 and its representative and bargaining agent, the Board of Education of Hortonville Joint School District No. 1.

The labor dispute began in January, 1974, over the 1973-1974 and the 1974-1975 teachers' contracts. Collective bargaining did not resolve the dispute and in March, 1974, a

substantial number of teachers engaged in a strike. The school board discharged over 80 teachers represented by the appellant HEA. This action was commenced to declare the action of the school board null and void and for reinstatement of the teachers.

The trial court granted the school board's motion for summary judgment as to the teachers' first cause of action and sustained the demurrers to the other three causes of action.

The appellants Michael Wisnoski, Rose Marie Olson, Thomas Nadeau, Judy Murphy, Russel Lichte and Ronald Hammond are teachers who were discharged by the board and represent all former Hortonville teachers similarly situated. Respondents Roger Weihing, Robert Hauk, Jean Meads, Floyd Meyer, Merlin Plamann, Victor Schroth and Ronald Surprise are members of the school board. Respondent Robert Kahes is the Hortonville High School Principal. Respondent Eugene Riedl is the Hortonville Junior High School and Elementary School principal. Respondent Marvin Obry is superintendent of the district.

The material facts, as they appear from the pleadings, the affidavits and other documents filed in support of and in opposition to the motion for summary judgment, are not in dispute. In January, 1974, negotiations between the HEA and the school board were in progress to reach a collective bargaining agreement on 1973-1974 and 1974-1975 teaching contracts. From about January 24 to January 30, the HEA engaged in "informational picketing," which did not interrupt any teaching activities. On Monday, March 18, the teachers went on strike. On March 20, the school district superintendent, at the direction of the board, sent letters to the teachers inviting them to return to their jobs. Several teachers did return on Friday, March 22nd.

On March 23rd, the superintendent, again at the direction of the board, sent a letter to each teacher again inviting them to return to work and advising them that strikes by public employees were illegal and that the board would not "condone unlawful activity" by its employees. None of the 86 teaching employees then on strike returned to work in response to said letter. On Tuesday, March 26th, and Wednesday, March 27th, classes were conducted for most students through the use of substitute teachers.

At a special school board meeting on Friday, March 29th, the board decided to schedule disciplinary hearings for each individual teaching employee then on strike. Notices [1] of the individual hearings were addressed to each teaching employee and specified the purpose of the hearing and the time at which he or she was to appear. The hearings, which were scheduled twenty minutes apart, were to be held on Monday, April 1, Tuesday, April 2, and Wednesday, April 3. The notices were delivered to

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[1] "The Board of Education for the Hortonville Community Schools has been informed by Superintendent Obry that since March 18, 1974:

"You have breached your individual employment contract;

"You have engaged in an unlawful strike contrary to Wisconsin law.

"This alleged conduct, if true, subjects you to disciplinary action by the Board, including termination of your employment contract.

"You are hereby notified that the Board of Education has set a hearing on this matter for ———, April —, 1974, at — o'clock in the ——noon, or as soon thereafter as you may be heard, at the high school library, 246 North Olk Street, Hortonville.

"At this hearing you will be given the opportunity to present any statement or evidence relevant to this alleged conduct.

"Be further advised that after such hearing the Board will notify you in writing of what disciplinary action, if any, the Board has determined appropriate."

the Outagamie county sheriff's department on Friday, March 29th, with a request that they be served as soon as possible. Twenty-three of the notices were served on Friday, March 29th, forty-four were served on Saturday, March 30th, twenty on Monday, April 1st, and one on Tuesday, April 2nd. The HEA was not notified of the hearing.

On Monday morning, April 1st, almost all the teaching employees represented in this class action appeared before the board en masse with their retained counsel and indicated, through him, that they would refuse to answer questions that they did not want individual hearings but rather preferred to be treated as a group. Their counsel also objected, on due process grounds, that the teaching employees did not receive fair notice of the hearings and that they were entitled to an impartial decisionmaker to determine the appropriate disciplinary measures, if any. Counsel for the teachers alleged that the work stoppage was provoked by the board's conduct, and sought to examine members of the board to establish that fact. This request was refused, but counsel was allowed to make an offer of proof regarding the unsatisfactory nature of the board's contract offers, its allegedly coercive and unlawful bargaining techniques, and an allegation that teachers were locked out of their places of employment. The board refused to consider the offer of proof and the hearing adjourned at 1:20 p.m.

On Tuesday morning, April 2nd, counsel for the teachers appeared before the board with four other teaching employees who had not appeared the previous day. These individuals all indicated that they took the same position as the other teachers and wished to be considered with the others.

On Tuesday afternoon, April 2nd, the board held a special meeting at which it adopted a resolution terminating the employment of the teachers in the class represented by appellants here. Letters were sent to such teachers indicating that their employment was terminated and that their offers of employment or contracts for the 1974-1975 school year were revoked or terminated.[2]

On April 5th the board held a hearing for a teacher who had erroneously been excluded from all prior action and proceeding. The teacher, through the counsel who represented the other teachers, indicated she wished to take the same position as the others, and was therefore discharged.

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[2] "Please be advised that the Board of Education met on April 2, 1974, and took the following action:

"The Board found you guilty of the conduct set forth in Mr. Weihing's notice of March 29, 1974. Specifically, it found that since March 18, 1974:

"You breached your individual employment contract;

"You engaged in strike activity contrary to Wisconsin law.

"Therefore, you are advised that your employment with the Hortonville Community Schools, Joint School District #1, Village of Hortonville, et al., is hereby terminated, effective immediately. Furthermore, this action includes the withdrawal of the offer of employment for the 1974-75 school term, and/or termination of such tendered employment contract. Be further advised that your district-paid WPS hospital insurance coverage will cease on April 30, 1974, unless you make contrary arrangements with the insurance company. Information regarding other fringe benefits will be forthcoming to you in the near future.

"The Board also directed the administration to commerce recruitment, both from within and outside the district, for professional staff for the balance of the 1973-74 school year and thereafter. You are invited to apply for any teaching position if you are interested in further employment in our district. You should contact Superintendent Obry or a principal if you wish to so apply."

Thereafter, the board began hiring replacement teachers and school reopened on April 8, 1974. Only one of the discharged teachers reapplied for employment and he was rehired.

In the first cause of action in their amended complaint, the plaintiffs-appellants, the HEA and the named teachers-plaintiffs as class representatives, alleged that the circumstances of the hearing and discharge constituted a deprivation of their property and liberty without due process of law as guaranteed under the Fourteenth Amendment of the United States Constitution and art. I of the Wisconsin Constitution. In the third cause of action, the appellants alleged that conduct of the board on Tuesday afternoon, April 2nd, constituted a violation of the open meeting law, sec. 66.77, Stats. The appellants sought, as relief, a declaration that the board's action was null and void, an order that the discharge of the teachers be set aside, an injunction proscribing the board from hiring additional replacements, an order that the contracts of the replacements be rescinded, an order requiring the parties to select an impartial decisionmaker to determine whether there was "just cause" for the discharge, and such other relief as might be appropriate.

The trial court granted the respondent-school board's motion for summary judgment on the first cause of action and sustained its demurrer to the third. The other causes of action stated in the amended complaint are not at issue here.

The plaintiffs appeal from the judgment and order.

BEILFUSS, J. The issues in this court are:

1. Does Wisconsin law allow the discharge of municipal employees who engage in a strike?

BLEED THROUGH

2. Does the action by the Hortonville school board in discharging teachers instead of obtaining a judicial order constitute selective enforcement of the Wisconsin prohibition of the right to strike, thereby denying to the teachers their right to equal protection of the laws?

3. Does the state's prohibition against strikes by teachers, without provision for binding arbitration and *de novo* review of reasonableness of punishment, when such benefits are provided for other public employees, constitute a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution?

4. Were the strikers denied due process of law because they were discharged by the Hortonville school board which is not a neutral, impartial and detached decision-maker?

5. Did the action taken by the Hortonville board of education constitute a violation of the open meeting law?

The general rule is that issues not presented to the trial court will not be considered for the first time on appeal. *Estate of Scherffius* (1974), 62 Wis.2d 687, 696, 697, 215 N.W.2d 547; *Resseguie* v. *American Mut. Liability Ins. Co.*, (1971), 51 Wis.2d 92, 103, 104, 186 N.W.2d 236. With respect to constitutional issues, this court had said it may, in its discretion consider such issues for the first time on appeal if it is in the interest of justice to do so and there are no unresolved factual issues. *State* v. *Morales* (1971), 51 Wis.2d 650, 654, 187 N.W.2d 841; *Bradley* v. *State* (1967), 36 Wis.2d 345, 359, 359a, 153 N.W.2d 38, 155 N.W. 2d 564. We believe, in this case, it is in the interest of justice to consider the issues raised as set forth above.

Does Wisconsin law allow the discharge of municipal employees who engage in a strike?

As to all municipal employees, sec. 111.70 (4) (1), Stats., provides:

> "Strikes prohibited. Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employe and such strikes are hereby expressly prohibited."

As to state employees, sec. 111.89, Stats., provides:

> "*Strike prohibited.* (1) Upon establishing that a strike is in progress, the employer may at his option either seek an injunction or file an unfair labor practice charge with the commission under s. 111.84 (2) (e) or both. In this regard it shall be the responsibility of the department of administration to decide whether to seek an injunction or file an unfair labor practice charge. The existence of an administrative remedy shall not constitute grounds for denial of injunctive relief.
>
> "(2) The occurrence of a strike and the participation therein by a state employe do not affect the rights given to the employer to deal with the strike, including:
>
> "(a) The right to impose discipline, including discharge, or suspension without pay, of any employe participating therein;
>
> "(b) The right to cancel the reinstatement eligibility of any employe engaging therein; and
>
> "(c) The right of the employer to request the imposition of fines, either against the labor organization or the employe engaging therein, or to sue for damages because of such strike activity."

The appellants contend that since employers of state employees are specifically given the right to discharge in the event of a strike, while no similar provision applies to municipal employees, that municipal employers are not allowed to discharge striking employees but are restricted to the remedy of injunction.

The respondents cite *Millar* v. *Joint School Dist.* (1957), 2 Wis.2d 303, 312, 86 N.W.2d 455, for the proposition that:

> "A school board has implied power to dismiss a teacher before the expiration of his term of service for good and sufficient cause. . . . If a teacher fails to perform his duties under his contract, the board may discharge him from further service."

They further contend that sec. 111.70 (4) (1), Stats., in no way diminishes that right. We believe they are correct in that contention. Sec. 118.22(2) provides:

> "On or before March 15 of the school year during which a teacher holds a contract, the board by which the teacher is employed or an employe at the direction of the board shall give the teacher written notice of renewal or refusal to renew his contract for the ensuing school year. If no such notice is given on or before March 15, the contract then in force shall continue for the ensuing school year. A teacher who receives a notice of renewal of contract for the ensuing school year, or a teacher who does not receive a notice of renewal or refusal to renew his contract for the ensuing school year on or before March 15, shall accept or reject in writing such contract not later than the following April 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the board. Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board. No such board may enter into a contract of employment with a teacher for any period of time as to which the teacher is then under a contract of employment with another board."

The reference to the fact that a teacher may be "dismissed" clearly indicates the existence of the right to discharge. Both *Millar, supra,* and *Richards* v. *Board of Education* (1973), 58 Wis.2d 444, 460b, 206 N.W.2d 597, indicate clearly that the term "dismiss" means to remove

from employment and not to merely refuse to renew a contract.

Furthermore, the power of the board to discharge a teacher for "just cause" is clearly preserved in the master contract [3] between HEA and the school district.

From the statutes, the cases cited, and the contract, we conclude the school board did have the power to discharge the teachers who engaged in the prohibited strike.

The appellants contend the action by the Hortonville school board in discharging the teachers instead of obtaining a judicial order constitutes selective enforcement of the Wisconsin prohibition of the right to strike, thereby denying to the teachers their right to equal protection of the laws as guaranteed by the state and federal constitutions.

The appellants argue that this is the first known instance in Wisconsin where striking teachers have been discharged. They assert that the usual procedure is for the school board to seek an injunction, and that the deviation from this practice in this case amounts to selective enforcement of the law and a denial of equal protection.

The respondents, in argument, deny this is the first instance of discharge because of strike activity. They also urge that there is an unresolved factual dispute involved, *i.e.*, what is the normal procedure in the case of teacher strikes. For the purpose of this opinion, we will assume the factual allegation of the appellants is correct.

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[3] The master agreement, while contained in the record at pages 214-225, was not part of or appended to either of the affidavits filed with respect to the motion for summary judgment. However, because we have decided to determine the issues raised upon appeal, this document should be considered.

BLEED THROUGH

Several factors bear on the question of whether the discharge amounted to a denial of equal protection due to selective enforcement of the law. The basic question that must be answered in the affirmative before a denial of equal protection can be found is whether a difference in treatment amounts to invidious discrimination. *Harper* v. *Virginia Board of Elections* (1966), 383 U.S. 663, 666, 86 Sup. Ct. 1079, 16 L.Ed.2d 169.

Arguably at least, there were other remedies the school board could have pursued. It could have sought an injunction, it could have sought fact-finding and mediation before the Wisconsin Employment Relations Commission,[4] it could have continued collective bargaining or it could have discharged the teachers for violating the statutory prohibition against public employee strikes as was done here. The fact the school board pursued one of the remedies does not *ipso facto* mean the teachers were denied equal protection. This is especially true in this case because we do not have a record which reveals all the pertinent and relevant facts upon which the board acted. What might be a fair and reasonable response on the part of the board might not be under a different factual background. Further, the right to discharge here is essentially contractual. Whether the master contract between the board and the school district and the contracts between the individual school teachers and the districts are comparable cannot be determined from the record in this case.

With one exception not material here, all of the striking teachers were treated the same. They were all given the same notices, all had the same opportunity to be heard, all were discharged and all given the right to apply for

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[4] Sec. 111.70, Stats. *See also, Muskego-Norway C.S.J.S.D. No. 9* v. *W.E.R.B.* (1967), 35 Wis. 2d 540, 151 N.W.2d 617.

reinstatement. The record does not reveal invidious discrimination and no denial of equal protection appears.

The appellants also contend that they were denied equal protection of the law in two additional respects: First, in that they are denied the right to strike, contrary to their counterpart in the private sector; and, second, in that they are denied certain benefits, *e.g.,* binding arbitration, which are accorded to other public employees, *i.e.,* police and firemen.

Absent a suspect classification or a fundamental right, neither of which are involved in this case,[5] this court has held that:

> "... to declare an act of the legislature as to a classification violative of the equal-protection clause, it is first necessary to prove that the legislature has abused its discretion beyond a reasonable doubt."

State ex rel. La Follette v. *Reuter* (1967), 36 Wis.2d 96, 111, 153 N.W.2d 49. *See also, Wiener* v. *J. C. Penney Co.* (1974), 65 Wis.2d 139, 147, 222 N.W.2d 149. There is a strong presumption of constitutionality which attaches to acts of the legislature, unless the court can say that no statement of facts can reasonably be conceived that would sustain it. *Weiner, supra,* page 147; *State ex rel. Hammermill Paper Co.* v. *La Plante* (1973), 58 Wis.2d 32, 46, 205 N.W.2d 784. Only if a classification is arbitrary and has no reasonable purpose or reflects no justifiable public policy will it be held violative of constitutional guarantees of equal protection. *Simanco, Inc.* v. *Department of Revenue* (1973), 57 Wis.2d 47, 57, 203 N.W.2d 648. In *Wiener,*

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[5] *See Warshafsky* v. *The Journal Co.* (1974), 63 Wis.2d 130, 216 N.W.2d 197; *United Federation of Postal Clerks* v. *Blount* (D.C. D.C. 1971), 325 Fed. Supp. 879, affirmed (1971), 404 U.S. 802, 92 Sup. Ct. 80, 30 L. Ed. 2d 38.

supra, page 147, this court reiterated five standards necessary for a proper classification:

> "(1) All classifications must be based upon substantial distinctions which make one class really different from another.
>
> "(2) The classifications adopted must be germane to the purpose of the law.
>
> "(3) The classifications must not be based upon existing circumstances only. They must not be so constituted as to preclude additions to the numbers included within a class.
>
> "(4) To whatever class a law may apply, it must apply equally to each member of thereof.
>
> "(5) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation." *See also, Dane County* v. *McManus* (1972), 55 Wis.2d 413, 423, 198 N.W.2d 77; *State ex rel. Ford Hopkins Co.* v. *Mayor,* (1937), 226 Wis. 215, 222, 276 N.W. 311.

Considering appellants' contentions in reverse order, they claim that teachers are denied equal protection because, unlike police and firemen, they are not accorded binding arbitration[6] or other dispute settlement rights. The different treatment accorded police and firemen is "based upon substantial distinctions which make one class really different from another." *Weiner, supra,* page 147. It is not difficult to find a rational basis for the legislation. If police or firemen go on strike the imminent and immediate danger to the community is so great that every reasonable measure must be taken to get them back on the job as soon as possible, or to prevent them from striking

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[6] *See* secs. 111.70(4)(jm) and 111.77, Stats.

in the first instance. The classification is not unreasonable and is a legitimate exercise of the legislative function.

A more difficult question arises with respect to the appellants' contention that they are denied equal protection, vis-a-vis nonpublic employees, by the application of the strike ban contained in sec. 111.70(4)(1), Stats.

Several rationales are typically propounded in support of no-strike laws for public employees. One relies on the sovereignty of the governmental employee and reasons that the government, unlike the private employee, cannot suspend operations nor go out of business nor increase its budgets, and therefore is entitled to expect a higher level of devotion to service. *Norwalk Teachers' Assn.* v. *Board of Education* (1951), 138 Conn. 269, 83 Atl.2d 482. Another rationale is that the peculiar nature of the government, as opposed to private employers, makes it particularly vulnerable to the strike.

> ". . . In the private sector, union demands are usually checked by the forces of competition and other market pressures. Negotiators are typically limited by such restraints as the entry of non union competitors, the impact of foreign goods, the substitution of capital for higher-priced labor, the shift of operations to lower-cost areas, the contracting out of high-cost operations to other enterprises, the shutdown of unprofitable plants and operations, the redesign of products to meet higher costs, and finally the managerial option to go out of business entirely. Similar limitations are either nonexistent or very much weaker in the public sector. While budgets and corresponding tax levies operate in a general way to check increases in compensation, the connection is remote and scarcely applicable to particular units of groups of strategically located public employees. Unhampered by such market restraints, a union that can exert heavy

> pressure through a strike may be able to obtain excessive wages and benefits." Cox and Bok, *Labor Law* (7th ed), pages 970, 971.

An additional rationale is that public employees have adequate opportunity to achieve their aims through the legislative process. *Note: The Strike and Its Alternatives in Public Employment,* 1966 Wisconsin Law Review, 549, 556. It is also often stated that the strike ban protects the public health, safety and welfare.

The position of the appellants is that neither these nor any other rationales can support the validity of the strike ban, at least with respect to them. They concede, of course, that a strike by police or firemen may result in real, immediate and irreparable harm to the community, and thus admit that the strike ban is valid as applied to those types of emergency services. They argue, however, that the statute is to broad in its scope.

Many courts have considered this issue and none have found a denial of equal protection. *See:* Annot. (1971), Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage, 37 A.L.R.3d 1147. As stated in *United Federation of Postal Clerks* v. *Blount, supra,* page 883:

> "Given the fact that there is no constitutional right to strike, it is not irrational or arbitrary for the Government to condition employment on a promise not to withhold labor collectively, and to prohibit strikes by those in public employment, whether because of the prerogatives of the sovereign, some sense of higher obligation associated with public service, to assure the continuing functioning of the Government without interruption, to protect public health and safety or for other reasons. Although plaintiff argues that the provisions in question are unconstitutionally broad

> in covering all Government employees regardless of the types of importance of the work they do, we hold that it makes no difference whether the jobs performed by certain public employees are regarded as 'essential' or 'non-essential,' or whether similar jobs are performed by worekrs in private industry who do have the right to strike protected by statute. . . . The Equal Protection Clause, however, does not forbid all discrimination. Where fundamental rights are not involved, a particular classification does not violate the Equal Protection Clause if it is not 'arbitrary' or 'irrational,' i.e., 'if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426, 81 S. Ct. 1101, 1105, 6 L.Ed.2d 393 (1961). . . ."

We conclude there is a meaningful distinction between governmental employees and nongovernmental employees. The strike ban imposed on public employees is based upon a valid classification and the legislation creating it is not unconstitutional as a denial of equal protection. If the no-strike ban legislatively imposed on public employees is to be abolished or altered, it must be done by the legislature and not the courts.

The teachers contend they were denied due process of law because the hearings were not considered and their discharges ordered by an impartial decisionmaker.

The Fourteenth Amendment to the United States Constitution provides, *inter alia*, that no state shall deprive any persons of property or liberty without due process of law. Before it can be determined whether the appellants were denied due process, it must be established that they were entitled to due process of law in that they were deprived of their property or liberty by state action.

State action is clearly present in this case. The Hortonville Joint School District No. 1 is organized under the

BLEED THROUGH

laws of the state of Wisconsin and is a municipal employer as defined in sec. 111.70, Stats. The school board is charged under chs. 118 and 120 with the management of the school district. The district, the board and their agents are therefore extensions of the state.

With respect to the question of deprivation of property, we refer to *Board of Regents* v. *Roth* (1972), 408 U.S. 564, 92 Sup. Ct. 2701, 33 L.Ed.2d 548, and *Perry* v. *Sindermann* (1972), 408 U.S. 593, 92 Sup. Ct. 2694, 33 L.Ed.2d 570. In *Roth,* the court decided that a nontenured assistant professor was not entitled to procedural due process when his one-year teaching contract was not renewed. The court stated:

> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.
>
> ". . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely on their daily lives, reliance that must not be arbitrarily undermined. It is purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . ." *Roth, supra,* pages 576, 577.

In *Perry, the court added:*

> "A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown. Yet absence of such an explicit contractural provision may not always foreclose the possibility that a teacher has a 'property' interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.' 3 A. Corbin on Contracts, secs. 561-572A (1960). Explicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' *Id.*, at sec. 562. And, '[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past.' *Ibid.*" *Perry, supra,* pages 601, 602. *See also, Pelisek* v. *Trevor State Graded School Dist. No. 7* (E.D. Wis. 1974), 371 Fed.Supp. 1064.

In *Wieman* v. *Updegraff* (1952), 344 U.S. 183, 73 Sup. Ct. 215, 97 L.Ed. 216, the court held that professors removed from office during the terms of their contracts were entitled to due process. *See also, Carpenter* v. *City of Greenfield School District No. 6* (E.D. Wis. 1973), 358 Fed.Supp. 220.

In this case the appellant-teachers were discharged during the terms of their 1973-1974 contracts and their offers or contracts for employment for the 1974-1975 school year were revoked or rescinded. This unquestionably amounted to a deprivation of property within the intendment of the due process clause.

The respondents contend that no deprivation of property is involved because the employees, by going on strike,

BLEED THROUGH

abandoned whatever property interest they had in continued employment. Going on strike, the respondents argue, is the equivalent of quitting, a unilateral breach of the employment contract which dissolves any property interests for due process purposes.

It is unnecessary to reach the merits of this contention, however, because the argument begs the question. One of the purposes of due process in this context is to determine whether the alleged conduct did in fact take place. To say that the performance of certain acts forecloses the requirement of a hearing to determine whether the acts were in fact performed is to engage in circular reasoning. The teachers were deprived of a constitutional property right in this case.

Another question to be considered is whether the teachers were deprived of liberty. The United States Supreme Court in *Roth, supra,* pages 573, 574, stated:

> "There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case.
>
> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437. *Wieman* v. *Updegraff,* 344 U.S. 183, 191. . . . In such a case, due process would accord an opportunity to refute the charge before University officials.

> In the present case, however, there is no suggestion whatever that the respondent's good name, reputation, honor, or integrity' is at stake.
>
> "Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For '[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury. . . .' *Joint Anti-Fascist Refugee Committee* v. *McGrath* [341 U.S. 123] . . . at 185 (Jackson, J., concurring). . ."

In *Roth,* there was no stated reason for the nontenured teacher not being rehired. In the case at bar, however, the stated reasons were two: (1) The teachers had breached their contract, and (2) they had engaged in a strike contrary to Wisconsin law. It is apparent that such charges could detrimentally affect an individual's reputation in the labor market and thereby significantly undermine his opportunities for re-employment. Due process requires a notice and hearing and an opportunity for the teachers to clear themselves of such charges.

Having determined that the teachers were entitled to due process, the more difficult question of what process is due emerges. The often-quoted *Cafteria & Restaurant Workers Union* v. *McElroy* (1961), 367 U.S. 886, 895, 81 Sup. Ct. 1743, 6 L.Ed.2d 1230, provides:

> ". . . consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the

> private interest that has been affected by governmental action."

Thus a balancing test must be established to weigh the interest of the school district in summary determination against the interests of the teachers in their continued employment. Only in light of that balancing test can it be determined whether the procedures afforded the teachers failed to satisfy the constitutional requirements of due process.

With respect to those procedures, the appellants allege their constitutional inadequacy in only one respect, *i.e.*, the lack of an impartial decisionmaker.[7] The requirement of an impartial decisionmaker is well established as an essential component of procedural due process. *See Gibson* v. *Berryhill* (1973), 411 U.S. 564, 578, 93 Sup. Ct. 1689, 36 L.Ed.2d 488; *Ward* v. *Village of Monroeville* (1972), 409 U.S. 57, 60, 93 Sup. Ct. 80, 34 L.Ed.2d 267; *Morrissey* v. *Brewer* (1972), 408 U.S. 471, 485, 92 Sup. Ct. 2593, 33 L.Ed.2d 484; *Goldberg* v. *Kelly* (1970), 397 U.S. 254, 271, 90 Sup. Ct. 1011, 25 L.Ed.2d 287. In *Morrissey*,

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[7] The appellants do make brief references to the alleged lack of timely notice, the failure of the board to present evidence against them, and the preclusion of the teachers from questioning members of the board or offering affirmative evidence. They do not argue these points, however, and the only issue raised regarding due process goes to the alleged lack of an impartial decisionmaker.

With respect to the lack of timely notice, it should be noted that although the longest notice received was four days, spanning a weekend, and the shortest was received on the day of the hearing, counsel for the teachers was asked at the hearing how much additional time he needed to prepare. Counsel replied that he would make an offer of proof and then let the board know if he needed more time. The offer was made but counsel never requested additional time thereafter.

involving the due process required to be afforded a parolee prior to revocation, the court stated:

> "In our view, due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case. It would be unfair to assume that the supervising parole officer does not conduct an interview with the parolee to confront him with the reasons for revocation before he recommends an arrest. It would also be unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality; realistically the failure of the parolee is in a sense a failure for his supervising officer. However, we need make no assumption one way or the other to conclude that there should be an uninvolved person to make this preliminary evaluation of the basis for believing the conditions of parole have been violated. The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them. *Goldberg* v. *Kelly* found it unnecessary to impugn the motives of the case worker to find a need for an independent decisionmaker to examine the initial decision." *Morrissey, supra,* pages 485, 486.

In *Ward, supra,* a case involving a situation where a city mayor was empowered to sit as judge to try ordinance violation cases, the fines from which constituted a significant part of the city's income, the court stated that the test was whether:

> ". . . [the] situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused. . . .' . . . ." *Ward, supra,* page 60.

It is important to note that procedural due process is not limited to the factual determination as to whether an

individual did or did not engage in the particular conduct. It extends as well to the action taken by the state once that conduct is established. As stated in *Morrissey, supra,* page 488:

> "This [due process] hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that violation does not warrant revocation."

Therefore it would seem essential, even in cases of undisputed or stipulated facts, that an impartial decision-maker be charged with the responsibility of determining what action shall be taken on the basis of those facts. "The principle of fair play is an important factor in a consideration of due process of law." *General Electric Co.* v. *Wisconsin Employment Relations Board* (1958), 3 Wis.2d 227, 241, 88 N.W.2d 691; *Durkin* v. *Board of Police & Fire Comm.* (1970), 48 Wis. 112, 122, 180 N.W.2d 1.

The background giving rise to the ultimate facts in this case reveals a situation not at all conducive to detachment and impartiality on the part of the school board. The board was the collective bargaining agent for the school district and thus was engaged in the collective bargaining process with the teachers' representative, the HEA. It is not difficult to imagine the frustration on the part of the board members when negotiations broke down, agreement could not be reached and the employees resorted to concerted activity. This is not to suggest, of course, that the board members were anything but dedicated public servants, trying to provide the district with quality education

while still keeping within its limited budget. They were, however, not uninvolved in the events which precipitated decisions they were required to make. The decision to discharge was possibly a convenient alternative which would eliminate their labor problems in one fell swoop. We conclude that the board was not an impartial decisionmaker in a constitutional sense and that the appellants were denied due process of law.

Respondents rely heavily on two cases, *Arnett* v. *Kennedy* (1974), 416 U.S. 134, 94 Sup. Ct. 1633, 40 L.Ed.2d 15, and *Johnson* v. *Board of Regents* (W.D. Wis. 1974), 377 Fed. Supp. 227, to support their contention that there is no due process violation involved in this case. In *Arnett,* a federal employee was discharged by his immediate superior because the employee allegedly made disparaging remarks about such superior. The court held that whatever expectancy of continued employment, and hence property right, the employee had in his job was created by the Lloyd-LaFollette Act (Act of Aug. 14, 1912, c. 389, sec. 6, 37 Stat. 555, now 5 U.S.C., sec. 7501), which provides in pertinent part at page 150:

> " '[N]o person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; . . .' "

The three justices who constituted the plurality in *Arnett* stated with respect to due process:

BLEED THROUGH

> ". . . the very section of the statute which granted him that right, a right which had previously existed only by virtue of administrative regulation, expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. . . ." *Arnett, supra,* page 152.

The plurality thus concluded that extent of the property right was limited by the act itself, and hence due process was not required. There is no analogous situation here.

In *Johnson,* the chancellors of the various campuses in the state university system were faced with budget cuts, and thus had to determine how to effectuate them. The plaintiff-professor was discharged by his chancellor as a result of such situation. With respect to the plaintiff's claim that the chancellor was an impartial decisionmaker, the court stated at page 240:

> "The initial decision obviously had to be made by someone and the chancellor was a wholly appropriate choice."

There is nothing in that case, however, to suggest a potential for bias or impartiality as in the case at bar and thus it is inapposite.

The respondents and amici curiae argue that the existence of postdetermination review procedures ameliorate any impartiality in the original determination. An analysis of the two procedures suggested, however, reveals their inadequacy. The first is the common-law writ of certiorari. The scope of review by certiorari is limited to determining:

> ". . .'. . . (1) Whether the board kept within its jurisdiction; (2) whether it proceeded on correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.' " *State ex rel. Ball* v. *McPhee* (1959), 6 Wis.2d 190, 199, 94 N.W.2d 711. *See also State* v. *Goulette* (1974), 65 Wis.2d 207, 222 N.W. 2d 622.

The second suggested procedure—review by the Wisconsin Employment Relations Commission under sec. 111.70 (4), Stats. Such procedure applies only in the case of employee prohibited practices, however. Neither of these alternatives provide for review to determine whether another course of action such as mediation, injunction, continued collective bargaining or arbitration would have been a more reasonable response on the part of the decisionmaker. In light of that fact, it is difficult to see how either review by common-law certiorari or by the WERC[8] can replace an impartial decisionmaker in the first instance.

When the teachers went on strike, the school board was undoubtedly faced with a situation that needed immediate attention. Clearly, it had a duty to keep the schools open and staff them with competent teachers. If the schools were closed so that the statutory minimum number of school days was not reached, monetary state school aid would have been denied or jeopardized leading to a severe budget crisis. True, it could have sought an injunction or gone to the WERC for some relief, but neither the courts nor the WERC could hire or fire teachers. Sec. 118.22 (2), Stats., provides in part:

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[8] But *see: Muskego-Norway C.S.J.S.D. No. 9* v. *W.E.R.B., supra.*

> "No teacher may be employed or dismissed except by a majority vote of the full membership of the board."

Assuming the school board did recognize, under this factual background, that it was not an impartial decision-maker or hearing officer as constitutionally contemplated, where was it to go to obtain an authorized impartial hearing officer or decisionmaker? The answer is that the law as it presently exists does not provide for one. Legislation could establish a necessary forum and procedures directly or by delegation to a proper department of government, but it does not.

When an adequate remedy or forum does not exist to resolve disputes or provide due process, the courts, under the Wisconsin Constitution,[9] can fashion an adequate remedy.

The plaintiffs-appellants contend that part of sec. 118.22 (2), Stats., which gives the school the exclusive right to hire and fire, is unconstitutional in that it denies due process. If the statute can be construed or procedures provided to meet a valid constitutional objection, it should be done.

We believe the school board should make the initial determination as to the hiring or firing of one or many

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[9] Sec. 9, art. I, Wis. Constitution, states: "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." *See also: State ex rel. Wickham* v. *Nygaard* (1915), 159 Wis. 396, 150 N.W. 513; *Wisconsin Telephone Co.* v. *Public Service Comm.* (1939), 232 Wis. 274, 287 N.W. 122, 287 N.W. 593; *Huebner* v. *State* (1967), 33 Wis. 2d 505, 147 N.W. 2d 646.

teachers. In those situations where due process is required, namely where the employed teacher's property right or liberty is at stake—notice, a hearing and a statement of reasons should be given. As much control as possible should be left with the school board to set policy and manage the school.

In those situations where an employed teacher is discharged or otherwise disciplined and due process is required, and the school board is in an adversary position, we hereby provide and direct that the dissatisfied teacher or teachers can, upon petition, obtain a *de novo* determination of all issues in any court of record in the county where the school district or a part of it is located. The issues shall be determined by the court without a jury, unless the judge determines to call a jury and receive an advisory verdict. The court shall resolve any factual disputes and provide for a reasonable disposition.

The trial of the contested issues shall be given a trial date preference consistent with the reasonable administration of the court's calendar.

This method of disposition is not ideal because a court may be required to make public policy decisions that are better left to a legislative or administrative body. However, because a fundamental constitutional protection is involved and no adequate forum exists, we fashion this remedy. It will be available to teachers[10] until such time and only until such time as the legislature provides a means to establish a forum that will meet the requirements of due process.

This procedure just announced requires that we reverse the trial court's summary judgment and that the

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[10] This remedy is limited to public school teachers because we deal here with a specific school teacher statute, sec. 118.22(2).

BLEED THROUGH

matter be remanded to the trial court with the right of the parties to amend their pleadings so as to bring the necessary issues before the trial court.

The appellants also assert that the action of the board of education, wherein it decided to discharge the striking teachers, was in violation of the open meeting law.

This issue was raised in the appellants' third cause of action in the amended complaint filed in the trial court.

Paragraph 15 of the amended complaint provides:

> "On April 2, 1974, the Board, its administrators and agents, met and held a special meeting at which they considered, decided and acted to terminate the employments of the plaintiffs and other teachers similarly situated. No notice of said special meeting was ever given to the plaintiffs, or any other teachers similarly situated nor to the public."

The open meeting law, sec. 66.77, Stats., provided in part, prior to June 15, 1974:

> "(2) To implement and insure the public policy herein expressed, all meetings of all state and local governing and administrative bodies, boards, commissions, committees and agencies, including municipal and quasi-municipal corporations, unless otherwise expressly provided by law, shall be publicly held and open to all citizens at all times, except as hereinafter provided. No formal action of any kind, except as provided in sub. (3), shall be introduced, deliberated upon or adopted at any closed session or closed meeting of any such body, or at any reconvened open session during the same calendar day following a closed session. No adjournment of a public meeting into a closed session shall be made without public announcement of the general nature of the business to be considered at such closed session, and no other business shall be taken up at such closed session.

"(3) Nothing herein contained shall prevent executive or closed sessions for the purposes of:

"(a) Deliberating after judicial or quasi-judicial trial or hearing;

"(b) Considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employe or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employe or person charged, investigated or otherwise under discussion."

The trial court sustained a demurrer to the third cause of action of the complaint, concluding that the meeting of the board fell within exceptions (3)(a) and (b) of the statute. With respect to (3) (b), the court noted that the complaint failed to allege that any employee had requested an open meeting.

The appellants' argument centers around the failure of the board to give any notice of the meeting. They contend that exception (3) (a) does not apply because deliberations after a "judicial or quasi-judicial trial or hearing" necessarily amounts to an "adjournment of a public meeting into a closed session," and therefore requires a public announcement or notice. No authority is cited for that proposition and we believe the language of the statute permits no such interpretation.

With respect to sub. (3)(b), the appellants contend that they are foreclosed from requesting an open meeting because notice that the meeting was to be held was never given. First, it must be noted that the statute (prior to June 15, 1974) did not require that notice be given. More importantly, however, paragraph 5 of the amended complaint, which is specifically incorporated by reference into

BLEED THROUGH

the third cause of action, clearly states that the board "notified the employees that the Board was considering taking action against their then current teaching contracts." In light of such allegation, which is borne out by other parts of the record, the appellants' contention that they had no opportunity to request an open meeting is without foundation. We conclude the demurrer to the third cause of action was properly sustained.

By the Court.—Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion. Order affirmed. No costs to be taxed.

No. 635

August Term, 1974

STATE OF WISCONSIN: IN SUPREME COURT

HORTONVILLE EDUCATION ASSN. et al.,
Appellants,

v.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al.,
Respondents.

HANLEY, J. (Concurring in part; dissenting in part).

I concur with the majority's conclusion that the demurrer to the third cause of action relating to the alleged violation of the open meeting law was properly sustained.

I respectfully dissent to the majority's ruling reversing the trial court's granting of summary judgment on the first cause of action.

Sec. 111.70(4)(1), Stats., provides as follows:

> "*Strikes prohibited.* Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employe and such strikes are hereby expressly prohibited."

The above provision means exactly what it states. Therefore, the action of the teachers, acting in concert, in refusing to report for work cannot be sanctioned as a strike either by this court, the school district, the teachers' union or the teachers. The action of the teachers constitutes a unilateral breach of employment.

On April 2, 1974 the board held a special meeting at which it adopted a resolution terminating the employment of the teachers who refused to report for work. Such action was an acceptance of the breach of contract by the teachers. With that acceptance, all employment relations between the board and the teachers terminated. Upon that termination any action on the part of the board relative to discharge was superfluous. There is no issue to be tried.

I would affirm the judgment.

I am authorized to state that Mr. Justice CONNOR HANSEN joins in this concurrence-dissent.

No. 635.

August Term, 1974.

STATE OF WISCONSIN: IN SUPREME COURT

HORTONVILLE EDUCATION ASSN. et al.,
Appellants,

v.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al.,
Respondents.

ROBERT W. HANSEN, J. (*concurring*). School boards in this state are directed by statute to contract for the services of qualified teachers in their schools.[1] School

[1] Sec. 118.21 (1), Stats., providing: "The school board shall contract in writing with qualified teachers. . . ."

teachers in this state are employees of such school boards and stand "in a contract relation."[2] Except as otherwise provided by statute,[3] or constitutionally required,[4] the entire relationship between a school board and a school teacher derives from the contract between them.[5]

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[2] *State ex rel. O'Neil* v. *Blied* (1925), 188 Wis. 442, 446, 206 N.W. 213, holding: "One engaged in teaching in this state and whose services are to be paid for in whole or in part by the state school fund . . . stands in a contract relation. . . ."

[3] *See: Muskego-Norway C.S.J.S.D. No. 9* v. *W.E.R.B.* (1967), 35 Wis. 2d 540, 557, 151 N.W. 2d 617, holding sec. 111.70 (3) (a), Stats., to prohibit municipal employers, including school districts, from "'1. Interfering with, restraining or coercing any municipal employee in the exercise of the rights provided in sub. 2.

"'(2) Encouraging or discouraging membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment.'"

See also: Sec. 119.42, Stats., establishing teacher tenure or permanent appointment atfer three years of continuous teaching service, but applying only to cities of the first class. As to status under tenure law, *see: State ex rel. Thompson* v. *School Directors* (1923), 179 Wis. 284, 288, 191 N.W. 746, citing *State ex rel. Murphy* v. *Board of Trustees* (1918), 168 Wis. 238, 169 N.W. 567.

[4] *See: Alston* v. *School Board of City of Norwalk* (4th Cir. 1940), 112 Fed. 2d 992, holding that the right of a negro teacher to declaratory or injunctive relief against the practice of a school board in fixing salaries for negro teachers at a lower scale than for white teachers is not waived, or otherwise precluded, by the fact that the negro teacher has entered into a contract with the school board for the current year to perform teaching services. (Certiorari denied in 311 U.S. 693, 61 Sup. Ct. 75, 85 L.Ed. 448.)

[5] *Board of Education of South Milwaukee* v. *State ex rel. Reed* (1898), 100 Wis. 455, 462, 76 N.W. 351, holding: ". . . . the relations and obligations between the relator . . . and the high school board of said district were purely and strictly of a contractual character. . . ."

BLEED THROUGH

The school board in Hortonville had entered into such contractual relationship with each of its school teacher employees for the school year, 1973-74. Each such personal service contract fixed the salary, determined the services to be performed and set the term or period of employment. Each such contract incorporated into it "the last collective bargaining agreement," the 1972-73 master contract, between the Hortonville school board and the Hortonville education association.[6] When the Hortonville teachers went on strike, they were teaching under contract, not after their contracts had expired.[7] When they failed to appear at the school to perform their duties under the contract, it became the duty of the school board to conduct an "inquiry into the question of the failure of a teacher to perform his contract obligation" and in case of such breach "to take such steps as may be necessary to carry out the purposes of the school."[8]

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[6] "It is Further Agreed, that this contract incorporates herein by reference, to have the same effect as if made a part thereof of the last collective bargaining agreement entered into by and between the Hortonville Education Association, and said School Board, dated May 8, 1972, and is subject to all terms and conditions of such collective bargaining agreement. . . ." (Individual contract, March 12, 1973.)

[7] As to "minimal procedural safeguards" of sec. 118.22, Stats., applying to teachers not rehired, *see: Richards* v. *Board of Education* (1973), 58 Wis. 2d 444, 458, 206 N.W. 2d 597.

[8] *Curkeet* v. *Joint School District* (1914), 159 Wis. 149, 152, 149 N.W. 708, this court holding: ". . . School boards have thereby [sec. 441, Stats. 1913] enjoined upon them very extensive duties in maintaining the common schools and in administering the school affairs. Such duties embrace that of inquiry into the question of the failure of a teacher to perform his contract obligation as a teacher, and if they find that a teacher has breached his contract it is their duty to take such steps as may be necessary to carry out the purposes of the school, and if a teacher has failed to perform his duties under his contract they can discharge him from further service. . . ."

Facing such duty to ". . . take such steps as may be necessary" to reopen the school, the Hortonville school board acted. It did not go to court (as appellants now claim it should have) to seek an injunction, not only declaring the strike illegal[9] but also ordering the teachers back to the classroom *under the contract.* It could have chosen this route, but was not required so to elect. Neither did the school board prefer charges of misconduct against the teachers, seeking their "discharge for cause" *under the contract.*[10] It could have taken this approach, but it is clear that it did not bring charges of misconduct *under the contract.* Instead, what the Hortonville school board did was to rescind or terminate the personal service contracts as to all teachers who elected to remain on strike (The dissenting-in-part opinion terms this ". . . an acceptance of the breach of contract by the teachers," which is another way of saying the same things.)

The communication sent each teacher by the board stated that the board had been informed by its superin-

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[9] *See:* Sec. 111.70 (4) (1), Stats. (upheld as constitutionally valid, applied to teachers, by majority opinion here), provides: "*Strikes prohibited.* Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employe and such strikes are hereby expressly prohibited."

[10] *Scott* v. *Joint School District* (1881), 51 Wis. 554, 557, 8 N.W. 398, this court holding: ". . . We think the school board . . . have the power to close the school and discharge the teacher for just cause. . . ." As to scope of judicial review of such discharge for just cause, *see: Clark* v. *Blochowiak* (1942), 241 Wis. 236, 239, 5 N.W.2d 772, holding, where board of vocational education discharged for cause a supervisor of its dental clinic after a hearing, that, on certiorari to review the action taken by the board, ". . . the only matter the court could properly consider was whether on the evidence properly received by the board the charges against the plaintiff were sustained."

BLEED THROUGH

tendent of schools that, "You have breached your individual employment contract; You have engaged in an unlawful strike contrary to Wisconsin law."[11] The communication set a time and place for hearings as to whether the individual teacher had breached the employment contract, and noted that possible board action, if the facts established such breach, included ". . . termination of your employment contract."[12] A subsequent resolution, adopted by the school board, terminated the employment relationship as to teachers who had been thus notified or who had waived notice of their ". . . alleged breach of employment contract and participation in an unlawful strike."[13] To the writer it appears clear that the school board, by thus terminating the employer and employee relationship on the ground of a major breach of such contract by the striking teachers, was descinding the contracts of personal service as to all teachers who did not return to their teaching assignments.

A contract, including a personal service contract,[14] remains in force in accordance with its terms, unless one party to it ". . . acts inconsistently with the duty imposed upon him by the contract, which amounts to an abandon-

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[11] Letter from Roger Weihing, President, for the Board of Education to individual teachers, March 29, 1974.

[12] *Id.*

[13] Resolution, Adopted by the Board of Education, April 2, 1974.

[14] 68 Am. Jur. 2d, *Schools,* sec. 143, page 475, stating: "The principles governing contracts generally are applicable to contracts for the employment of teachers. Thus, such a contract is considered one for personal services and, where entered into for a definite term, is an entire contract for the period covered."

ment. . . .'"[15] However, it is not every breach of a contract consisting of failure to perform exactly that entitles the other party to rescission. Our court has held that, before a party not in default may be entitled to relief of rescission, there must be "so serious a breach of the contract by the other party as to destroy the essential objects of the contract."[16] Or, as another court has phrased it, the failure of performance, in order to constitute a ground for rescission, must be total, "such as to defeat the object of the contract or render it unattainable."[17] The claim of right to terminate and rescind its contracts with its teachers on ground of breach of contract was properly assertable by the Hortonville school board. But the determination of whether the claimed breach of contract constituted ground for such rescission was here for a court to decide.

With the school board action found to be a rescission of contract, based on claim of teacher breach of contract, it follows that either party to the contract had right of recourse to the courts for a judicial determination of whether the breach warranted the rescission.[18] With the multiple

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[15] 17 Am. Jur. 2d, *Contracts*, sec. 482, page 951.

[16] *Hoffmann* v. *Danielson* (1947), 251 Wis. 34, 38, 27 N.W. 2d 759, this court holding: ". . . Before a party not in default may be entitled to the relief of rescission, there must be so serious a breach of the contract by the other party as to destroy the essential objects of the contract. . . ."

[17] *Ellison, Son & Co.* v. *Flat Top Grocery Co.* (1911), 69 W. Va. 380, 387, 71 S.E. 391, stating the rule to be "'Generally the failure of performance, in order to constitute a ground for rescission, must be total; such as to defeat the object of the contract or render it unattainable. . . .'" Quoting 24 Am. & Eng. Ency. L. 644.

[18] 17 Am. Jur. 2d, *Contracts*, sec. 503, page 979, stating: "Although contracts do not terminate as a matter of course on a breach, they may be terminable therefor. . . ."

BLEED THROUGH

cancellations of personal service contracts involved in an area of vital public concern, in the case before us the legal remedy is obviously inadequate, and the aid of a court of equity is required.[19] It follows that the school board here might have sought by application to a court of equity a judicial affirmation of its action in rescinding the employment contracts on ground of serious breach of contract by the teachers. Certainly the teachers, all or any one of them, are also entitled to challenge in a court of equity the action taken by the board. In either event, the issue for the court to determine is whether the breach of their contracts by the teachers under the circumstances,[20] was such as to warrant the school board's action in terminating their employment and rescinding their contracts. The test is the *Hoffman Case* test.[21] In the posture of this case, the teachers have instituted equity proceedings, but not for the purpose above set forth. However, with an opportunity to amend such petition or pleadings granted, the proceedings instituted can be amended to present this issue and permit a judicial determination as to whether the teacher conduct, under the circumstances, justified the school board action.

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[19] *See:* 17 Am. Jur. 2d, *Contracts,* sec. 485, page 955.

[20] 17 Am. Jur. 2d, *Contracts,* sec. 501, page 977, stating: "No hard and fast rule exists as to the right of rescission for cause; the right usually depends on the circumstances of the particular case. . . ." *See also:* 17 Am. Jur. 2d, *Contracts,* sec. 503, page 980, stating: ". . . Moreover a party seeking to rescind must show that he was free from default in relation to the obligation which he claims the other party failed to perform. . . ." *See also:* As to violations of contract held not to justify rescission: *E. L. Husting Co.* v. *Coca Cola Co.* (1931), 205 Wis. 356, 237 N.W. 85, 238 N.W. 626.

[21] *Hoffman* v. *Danielson, supra,* footnote 16.

Also on appeal to this court is the challenge to an order of the county court of Outagamie county, the Honorable R. Thomas Cane, presiding, which included orders that the school board submit a list of discharged teachers whom the board "would offer positions back" for the balance of the 1973-74 school year, that the board offer striking teachers positions for the balance of the 1973-74 school "... if and when vacancies arose," and that striking teachers offered a vacancy for the remainder of the 1973-74 school year accept such offer. The basic issue on appeal appears to be the jurisdiction of the county court, sitting in equity, to issue the order. The board initiated the proceedings involved, seeking a court order limiting picketing activity. Without comment on the issues raised on such appeal, pro or con, the writer considers it unfortunate that such appeal (No. 133, August Term, 1974) was not consolidated with the appeal here, so that all aspects of judicial proceedings involving the Hortonville teachers' strike could have, at one time and in one opinion, been considered and determined.

On this appeal, however, applying the law to the facts, the writer would: (1) Concur in the majority holding that the no strike by county or municipal employees' statute, sec. 111.70 (4) (1), Stats. is constitutionally valid; (2) concur in the majority holding that the open meeting law was not here violated; and (3) concur in the majority holding for reversal and remand but would limit the scope and purpose of such remand, with appellants here granted leave to amend their petition within thirty days, the petition to be amended to raise and present for judicial determination the issue of whether the acts of the teachers, under these circumstances, justified the school board in rescinding the employment contracts and terminating employment.

No. 635

August Term, 1974

STATE OF WISCONSIN: IN SUPREME COURT

HORTONVILLE EDUCATION ASSN., et al.,
Appellants,

v.

HORTONVILLE JOINT SCHOOL DISTRICT No. 1, et al.,
Respondents.

PER CURIAM (*on motions for rehearing*). The last sentence on page 482, continuing on page 483 of 66 Wis. 2d 469 is revised as follows:

> "Whether the master contract between the board and the Hortonville Education Association and the contracts between the individual school teachers and the board are comparable to contracts involved in other cases where striking teachers were disciplined or discharged cannot be determined from the record in this case."

Motions for rehearing are denied without costs.

DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT TO FIRST CAUSE OF ACTION

NATURE OF PROCEEDINGS:

The plaintiffs filed their original verified complaint alleging a single cause of action on April 5, 1974, to which the defendants responded by way of a verified answer filed

April 24, 1974. Subsequently on May 31, 1974, the plaintiffs upon leave of this Court and pursuant to a verbal agreement of counsel for all parties filed a verified amended complaint alleging four separate causes of action. Prior to the expiration of forty days after joinder of issue by the defendants' answer to the original complaint, this Court by an order dated June 3, 1974, extended the time for moving for summary judgment pursuant to Secs. 269.45 and 270.-635, Stats., inasmuch as this Court construed *Snowberry* v. *Zellmer* (1964), 22 Wis.2nd 356; 126 N.W.2d 26, to require a motion for summary judgment to be made within forty days of joinder of issue by the original pleadings. The defendants answered the first cause of action alleged in the amended complaint and moved thereafter for summary judgment as to the first cause of action within the enlarged time allotted by the Court.

DECISION:

The motion for summary judgment now before this Court pertains to a cause of action based on a theory of various due process violations arising out of a strike by the plaintiff teachers of the Hortonville Joint School District No. 1. The strike commenced March 18, 1974, and on April 2, 1974, the Hortonville Board of Education terminated the employment of the 88 members of the plaintiff class. Certain members of the plaintiff class have returned to work pursuant to an order of another Court, which order is now in the appeal process. However, those members of the plaintiff class who have returned to work have continued as members of the plaintiff class in the present action.

The plaintiffs in the present case are the Hortonville Education Association which, prior to March 18, 1974, represented all teachers under contract with the Hortonville

Joint School No. 1, and six of the terminated teachers who are alleged to be "representative of all teachers employed by the District whose employments the Board has acted to terminate." The requisite allegations are set forth in the plaintiffs' amended complaint so as to enable this Court to deem the present matter a class action as provided for in Sec. 60.12 Stats.

One of the defendants is the Hortonville Joint School District No. 1 which had prior to April 2, 1974, employed the plaintiff class; the remaining defendants are members and officers of the Hortonville Board of Education in their official and individual capacities as well as three administrators of the Hortonville Joint School District No. 1 in their official and individual capacities.

Termination of employment by the Hortonville Board of Education was applicable to the 1973-74 school year contracts with the individual members of the plaintiff class and the 1974-75 school year contracts which had been tendered by the Hortonville Board of Education to the individual members of the plaintiff class. There exists no master contract between the Hortonville Education Association and the Hortonville Joint School District No. 1 for either the 1973-74 and 1974-75 school years.

In order to determine if the defendants have set forth such facts as shall show their denials or defenses to be sufficient to defeat the plaintiffs' first cause of action under the statutory criteria of Sec. 270.635, Stats. it appears appropriate in this instance to first consider the plaintiffs' theory of various procedural due process violations as set forth in the plaintiffs' amended complaint. This Court, as did the Court in *American Mutual Liability Insurance Company* v. *St. Paul Fire and Marine Insurance Company*, (1970), 48 Wis. 2nd 305; 179 N.W. 2nd 864, finds it

necessary to review in part the amended complaint in order to determine whether the defendants' affidavit in support of their motion for summary judgment contains the required evidentiary facts so as to entitle the defendants to summary judgment. However, the amended complaint as well as the defendants' answer, as pleadings, are not effectual as factual proof and cannot perform the requisite function of affidavits. *Leszczynski* v. *Surges* (1966), 30 Wis.2nd 534; 141 N.W.2d 261. Only two affidavits were filed herein. Mr. Roger Weihing, a member and president of the Board of Education of the Hortonville School District No. 1, filed an affidavit in support of the defendants' motion for summary judgment. Mr. Michael Wisnoski, a member of the plaintiff class and president of the Hortonville Education Association, filed an affidavit on behalf of the plaintiffs in opposition to the motion for summary judgment.

Paragraph 5 of the amended complaint is the first material paragraph containing allegations relating to procedural due process. That paragraph, in its entirety, alleges:

> "5. Immediately prior to, during and immediately following the weekend of March 30 and 31, 1975, the individually-named plaintiffs, and all other teachers represented by the Association, were served notices that the Board had scheduled hearings for each and every one of them, at twenty-minute intervals, commencing Monday Morning, April 1, 1974, through and until late on Wednesday evening, April 3, 1974. These notices notified the employees that the Board was considering taking action against their then current teaching contracts. Said notices failed to afford the plaintiffs, and others who received similar notices, a fair or adequate opportunity to consult with an attorney or to prepare for a hearing or to defend against the reason that the Board might consider for the termination of their employment."

The affidavit of Roger Weihing, submitted on behalf of the defendants states in paragraphs 8 and 9 essentially that during a special School Board meeting held on March 29, 1974, it was decided to schedule disciplinary hearings for each individual member of the plaintiff class then engaged in a work stoppage and that a notice of the disciplinary hearings were delivered to the Outagamie County Sheriff's Department on March 29, 1974, for service on each individual teacher. Exhibit "B" attached to Mr. Weihing's affidavit is a copy of the notice of the individual disciplinary hearings. Also attached to that same affidavit and identified as exhibit "C" is a compilation of the dates the disciplinary hearing notices were served on the individual members of the plaintiff class and the date and times of the scheduled disciplinary hearings. It appears from exhibit "C" that all the teachers subject to a disciplinary hearing here served notice of such hearing on or before April 2, 1974, with the exception of Mrs. Nancy Miller. In all, eleven teachers were served notices, including the day of service, four days before their scheduled hearing, fifty-one teachers three days prior to their scheduled hearing, twenty-two teachers two days prior to their scheduled hearing, three teachers one day prior to their scheduled hearing and one teacher received her notice the day of her scheduled hearing. It should be noted that the first notices were served on March 29, 1974, which was a Friday (twenty-three in number) with the balance being served on the next day, a Saturday (forty-four in number) and both Monday (twenty in number) and Tuesday (one in number) of the following week. As to the actual contents of the notice of disciplinary hearings, the dates the notices were served and the dates of the scheduled disciplinary hearings no factual controversy exists.

However, with respect to the aforesaid notices and their service on the teachers it is the plaintiffs' conclusion as stated in the amended complaint that such notice did not give them adequate opportunity to:

a) consult an attorney

b) prepare for their scheduled hearings

c) defend against reasons the School Board might consider for termination of employment.

By means of Mr. Weihing's affidavit, in particular paragraphs 9 and 10 thereof the defendants have set forth facts relating to the conduct and statements of plaintiffs' counsel at the April 1, 1974, hearing before the Hortonville Board of Education. That meeting was attended by all members of the plaintiff class in mass rather than individually as scheduled with the exception of five teachers who remain members of the plaintiff class. Among those facts are the plaintiffs' appearance before the Hortonville Board of Education with an attorney, the objection of the plaintiffs' attorney to the insufficiency of the notice without a specified request as to the additional length of time needed for preparation or a request for an adjournment and the participation of plaintiffs' counsel in the proceedings. On the basis of those primary facts the defendants urge that it can reasonably be inferred that the notice in question was timely and adequate and, if not, any objection thereto was waived by failure to specifically request an adjournment of a specified length.

With respect to the adequacy and timeliness of the notice of the disciplinary hearings this Court deems there to be no controverted facts. Only the inferences to be drawn from those facts upon which legal conclusions can be based

are in dispute. This is not to say, however, that such inferences are reasonable.

Paragraph 6 of the plaintiffs' amended complaint relates to the actual procedure utilized at the April 1, 1974, appearance of all but five members of the plaintiff class before the Hortonville Board of Education. In its entirety paragraph 6 recites:

> "6. On Monday, April 1, 1974, the plaintiffs and other similarly situated teachers appeared before the Board and objected to the lack of fair and adequate notice of and opportunity to prepare for the scheduled hearings, and objected to the Board acting as the decision-maker in their cases, because of its involvement in the very circumstances which gave rise to the Board's consideration of the termination of their employments. Plaintiffs and other teachers requested the opportunity to present evidence in their defense, in mitigation of reasons the Board might consider grounds for the termination of their employments. At the beginning of said appearance before the Board, the plaintiffs and the other teachers further requested the opportunity to examine adversary management personnel relative to the charges against them. All of the objections and requests made by the plaintiffs and by other teachers were denied by the Board, which acted on the advice of its attorney. The Board's attorney acted both as counsel to the Board and as prosecutor, presenting the charges and evidence against the plaintiffs. No evidence was adduced at the hearings against any of the plaintiffs or other teachers who appeared before the Board."

Scrutinizing Mr. Weihing's affidavit submitted on behalf of the defendants with respect to that portion pertaining to the April 1, 1974, proceedings before the Board of Education, there are the following pertinent facts:

a) counsel for the plaintiffs did object to the sufficiency and adequacy of the disciplinary hearing notices

b) counsel for the plaintiffs was denied the opportunity to question various Hortonville Board of Education members adversely

c) counsel for the plaintiffs did make an offer of proof

d) counsel for the plaintiffs instructed the members of the plaintiff class not to answer questions addressed to them individually and the plaintiff class did not individually respond to any questions by the Board of Education

e) counsel for the plaintiff advised the Board of Education that all members of the plaintiff class were relying on the Hortonville Education Association to respond on their behalf and that individual hearings were not necessary.

The evidentiary facts contained in the plaintiffs' affidavit in opposition to the motion for summary judgment do not controvert the facts related above as they appear in the defendants' supporting affidavit. The plaintiffs' affidavit does, however, add the additional facts that counsel for the plaintiffs objected to the Hortonville Board of Education acting as decision-maker and its counsel acting in a dual capacity as adviser and prosecutor. Neither the affidavit submitted by the defendants or the plaintiffs actually state whether evidence was received at the April 1, 1974, hearing beyond the offer of proof made by plaintiffs' counsel.

It should be noted that paragraph 10 of the affidavit of Michael Wisnoski submitted on behalf of the plaintiffs

stated that the Board of Education refused to permit evidence to be presented on behalf of Mr. Wisnoski by way of a defense and in mitigation of any conduct on his part. As to whether that statement refers to evidence in addition to the offer of proof made by plaintiffs' counsel and the request to adversely examine various Board of Education members is unclear unless read in conjunction with paragraph 11 of that same affidavit. Paragraph 11 states that Mr. Wisnoski authorized the Hortonville Education Association to respond on his behalf and he personally chose to follow his counsel's advice not to respond individually. The only reasonable inference from the apparently contradictory statements of fact is that paragraph 10 of Mr. Wisnoski's affidavit in conjunction with the remainder of his affidavit, and in particular paragraph 11, refers to the offer of proof and the attempt to adversely examine the Board of Education members on behalf of all teachers represented by the Hortonville Education Association, not any additional attempt to present evidence on behalf of Mr. Wisnoski individually. Also, it should be noted that Mr. Wisnoski's individual disciplinary hearing had been scheduled as shown by exhibit "C" not for April 1st but for 9:20 a.m. on April 2, 1974.

The material facts as to the procedure of what the plaintiff class turned into a mass disciplinary hearing on April 1, 1974, are not controverted. It is only the inferences to be drawn from those facts and various statements made by counsel for both the plaintiff and the defendants that are disputed.

Considering next paragraph 7 of the plaintiffs' amended complaint it is alleged:

> "7. By letters dated April 2, 1974, the plaintiffs' and, on information and belief, almost all other teach-

ers employed by the District, were notified by the Board that the Board had acted to terminate their employment, both under the current teaching contracts, and under the teaching contracts they had signed for the 1974-75 school year. By the same letters, the plaintiffs and other teachers were invited individually to reapply for employment with the District. At no time have the plaintiffs, or any other teachers similarly situated, ever been informed of the evidentiary basis for the Board's decision to terminate their employment both this year and for the 1974-75 school year."

A copy of the termination notice was not attached to the affidavit submitted on behalf of the defendants in support of their motion for summary judgment. However, paragraph 16 of the defendant affidavit specifically refers to and identifies the termination notice in question and thereby incorporated by reference exhibit 2 introduced at a prior evidentiary hearing conducted by this Court. The notice of termination provided in pertinent part:

"The Board found you guilty of the conduct set forth in Mr. Weihing's notice of March 29, 1974. Specifically it is found that since March 18, 1974;

You breached your individual employment contract: You engaged in strike activity contrary to Wisconsin law.

The Board further found that these breaches of duty in law constitute good and sufficient cause for the immediate termination of your teaching contract.

Therefore, you are advised that your employment with the Hortonville Community Schools, Joint School District No. 1, Village of Hortonville, *et al.*, is hereby terminated, effective immediately. Furthermore, this action includes the withdrawal of the offer of employment for the 1974-75 school term, and/or termination of such tendered employment contract."

The defendants' affidavit further states that the aforementioned notice of termination was sent by certified mail to each terminated member of the plaintiff class. Nothing in the affidavit of Mr. Wisnoski submitted on behalf of the plaintiffs controverts the contents or mailing of the notice of termination. According to the plaintiffs' affidavit, on April 3, 1974, he received a copy of the Board of Education's resolution to terminate the plaintiff class. Additionally, Mr. Wisnoski states in his affidavit in paragraph 15 that he has personally never been informed of the evidentiary basis for the Board of Education's conclusion that he has breached his contract or engaged in an unlawful strike, nor that he was ever informed of the evidentiary basis for the decision to terminate his employment for the 1973-74 and 1974-75 school years.

Once again it is apparent that as to the pertinent material facts relating to alleged due process violations as set forth in paragraph 7 of the plaintiffs' amended complaint there is no dispute other than as to the inferences to be drawn from the facts.

Reviewing next paragraph 8 of the plaintiffs' amended complaint it is alleged therein:

> "8. The Association, which represents the plaintiffs and all other teachers employed by the district, was not informed of the hearings scheduled by and before the Board for April 1, 2, and 3, 1974. The Association also was not given any advance notification of the Board's decision to terminate the employment of the plaintiffs and other teachers represented by the Association."

There is no reference contained in the defendants' affidavit that Mr. Weihing addressed a notice to the Hortonville Education Association itself with respect to the

scheduled disciplinary hearing of April 1, 2, and 3, 1974, and the decision to terminate the employment of the plaintiff class. In paragraph 7 of the plaintiffs' opposing affidavit it is stated that no advance notice was given to the Hortonville Education Association as an organization with respect to the disciplinary hearings. In paragraph 13 of the plaintiffs' affidavit it is further stated that notice of the Board of Education decision to terminate the members of the plaintiff class was received *post facto*.

Concerning the question of advance notice to the Hortonville Education Association there appears in the affidavits no controverted facts as to the lack of advance notice of the disciplinary hearings and the decision to terminate the employment of the plaintiff class.

Summarizing the plaintiffs' allegation of specific procedural due process violations they are in substance in brief:

a) Timeliness and adequacy of the disciplinary notices.

b) Board of Education sitting as decision-maker at the disciplinary hearing.

c) Prohibition of adverse examination of various Board of Education members at a disciplinary hearing.

d) Counsel for the Board of Education simultaneously acting as adviser and prosecutor.

e) No evidence against the plaintiff adduced at the disciplinary hearing.

f) Lack of notice of evidentiary basis for concluding there was a breach of contract and an unlawful strike nor notice of evidentiary basis for termination of employment of the plaintiff class.

g) Lack of advance notice to the Hortonville Education Association concerning the disciplinary hearings and the termination of employment of the plaintiff class.

On the basis of the foregoing alleged violations of procedural due process the plaintiffs formulate their theory of the first cause of action in their amended complaint. The plaintiffs allege that all of the aforesaid due process violations were done under color of State law, intentionally, maliciously, capriciously and arbitrarily, and in bad faith and as part of a conspiracy to deny the members of the plaintiff class their procedural due process rights under the 14th Amendment to the United States Constitution and Article 1 of the Wisconsin Constitution. As a result, the plaintiffs allege, *inter alia,* that they have effectively been denied their property interest in continued employment with the Hortonville Joint School District No. 1 as well as their liberty in securing employment in the teaching profession. Such deprivation of procedural due process the plaintiffs further allege has resulted in irreparable damage to their persons, reputations and financial interests.

As stated by the Court in *American Mutual Liability Insurance Company* v. *The St. Paul Fire and Marine Insurance Company, supra,* at page 312, a motion for summary judgment, when invoked by a defendant, is used on the assumption that even though a complaint states a cause of action the cause is factually unsupportable. Inasmuch as the Court had deemed there to be no dispute as to the material facts involved in this case, if the defendants' affidavit in support of the motion for summary judgment contained no additional facts this Court could deem the defendants to have attempted to use a motion for summary judgment as a substitute for a demurrer.

However, there remains one fact in the defendants' affidavit by Mr. Weihing which is uncontroverted by the plaintiffs' affidavit in opposition to the motion for summary judgment. That fact is set forth in paragraph 2 of Mr. Weihing's affidavit which reads:

> "That commencing Monday, March 18, 1974, the teaching employees then employed by said school district engaged in an unlawful strike against the defendant school district; . . ."

Reference to the strike being unlawful is, of course, a conclusion and not a fact and as such, is inappropriate in an affidavit requiring evidentiary fact. Sec. 270.635, Stats. continuing through the remainder of Mr. Weihing's affidavit it is clearly stated that the strike by the members of the plaintiff class continued up to and through April 2, 1974, the date of the employment discharges. Thus, it is uncontroverted that the underlying fact that a strike existed commencing March 18, 1974, establishes the framework within which this Court can consider the concept of due process. For as the Court stated in *Goldberg* v. *Kelly*, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L. Ed. 2nd 287 (1970), in quoting an earlier case:

> ". . . consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by government action."

EMPLOYER-EMPLOYEE RELATIONSHIP SUBSEQUENT TO MARCH 18, 1974

The individual members of the plaintiff class were prior to March 18, 1974, municipal employees as defined in Sec. 11.70(1) (b), Stats., and the Hortonville Joint School

District No. 1 was at all times pertinent herein a municipal employer as defined in Sec. 11.70(1)(a), Stats. Thus at all times relevant the members of the plaintiff class were prohibited from engaging in a strike by virtue of Sec. 11.70(4)(1) which provides:

> "Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employee and such strikes are hereby expressly prohibited."

It is urged by the defendants that this Court equate the terms "strike" and "quit" thereby alleviating any constitutional duty on their part to grant the plaintiff class due process. This State has not adopted that position with respect to strikes in the public employment sector nor have the defendants cited authority from other jurisdiction on that point. In the private employment sector the Wisconsin rule is that a strike is a cessation of work on the part of strikers and does not in and of itself constitute a termination of the employer-employee relationship; it is a subsequent discharge which severs the employer-employee relationship. *Marathon Electric Manufacturing Corporation* v. *Industrial Commission* (1955), 269 Wis. 394; 69 N.W.2nd 573. *Fredericks* v. *Industrial Commission* (1958), 4 Wis.2nd 519, 91 N.W.2d 93. In fact, it is a frequent practice in this State for a municipal employer to obtain a court injunction when confronted with a strike. Such a procedure is based on the existence of an employer-employee relationship. While no longer valid law, Sec. 111.70(7), Stats., (void since September 1, 1973) referred to "employe" and "employer" is a public employment strike situation wherein the legislature prescribed the penalty for continuing to engage in a strike after a court injunction was issued. In their brief the defendants have made reference to obtaining a Court order enjoining the strike as one of the options

available to them which they need not have nor did they exercise. This Court can see a grave consequence to the general public by equating the terms "strike" and "quit" when one considers police, fire and sanitation personnel striking in metropolitan areas. Operations would not only be at a standstill but would be hampered long after commencement of a strike. I find no basis in law nor in public policy that compels construing a prohibited public employment strike as in and of itself terminating the municipal employer-employee relationship.

DUE PROCESS CONCEPT OF PROPERTY AND LIABILITY

As employees of the Hortonville Joint School District No. 1 it must be next determined if the members of the plaintiff class were entitled to a due process hearing. The State action involved is, of course, the discharge by the school district which is created and controlled by State law and State agencies. The property interest of the plaintiffs does not arrive by means of statutory provision because Chapter 118 of the Wisconsin Statutes does not provide for tenure for teachers employed in a school operating and lying in a county having a population less than 500,000. Section 118.21, Stats., does, however, require individual contracts to be executed between individual teachers and school boards. In addition, Sec. 118.22, Stats., establishes the mechanism for renewal or refusal to renew such individual contracts, but no procedure for discharge is established by statute. Sec. 118.22, Stats., further requires that notice of renewal or refusal to renew individual contracts must be given on or before March 15 of each year. Although the plaintiff class was engaged in a prohibited strike when discharged, the members of the plaintiff class retained an interest in continued employment. *Perry* v. *Sinderman*,

408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 570 (1972) and *Board of Regents of State College* v. *Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 548 (1972) involved nonrenewal of untenured teachers who had one year contracts. Although the Court in *Roth, supra*, held the teacher not to be entitled to due process because he had no interest or entitlement to future employment, the Court stated:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to indicate those claims.
>
> "Property interests, of course, are not created by the constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (408 U.S. 577, 92 S. Ct. 2709)

In *Perry, supra,* the Court did find a denial of due process stating:

> "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." (408 U.S. 601, 92 S. Ct. 2699)

A summary dismissal of an untenured teacher not under formal contract without a hearing or inquiry was contrary to due process on the basis of an implied promise of continued employment. *Connell* v. *Higgenbotham* (1971), 403 U.S. 207, 91 S. Ct. 1772, 29 L.Ed. 418.

Certainly the plaintiff teachers relied on their employment with the defendant Hortonville Joint School District No. 1. Prior to discharge the plaintiff teachers were entitled to their jobs for the remainder of the 1973-74 school year with the valid expectation of continued employment for the 1974-75 school year. Such objective expectation of continued employment could in part be founded in the statutory dictates of Secs. 118.21 and 118.22 Stats., with respect to the mandatory existence of individual teacher contracts and non-renewal procedures for those contracts. In addition to their existing individual contracts for the school year 1973-74, the plaintiff teachers had been tendered contracts for the 1974-75 school year. Thus this Court deems the members of the plaintiff class to have the requisite property interest, that is, expectation of continued employment with the defendant Hortonville Joint School District No. 1 so as to entitle them to a due process hearing.

The Court in *Roth, supra*, also addressed itself to the issue of deprivation of liberty of a result of a stigma attached stemming from charges against an individual wherein it is stated:

> "[W]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." (citations omitted; 408 U.S. 573, 92 S. Ct. 2707)

In the instant case the charges asserted against the plaintiff teachers were that they had breached their individual contracts and engaged in an unlawful strike contrary to Wisconsin law. While those charges do not bear the same stigma as would charges of immorality or dishonesty, they do constitute charges that in all likelihood would diminish the plaintiff teachers' prospective employment opportunities. Thus this Court also deems there to be a signif-

BLEED THROUGH

icant potential deprivation of liberty because of the nature of the charge so as to entitle the plaintiff class to a due process hearing.

DUE PROCESS PROCEDURES

Having been entitled to a due process hearing and having been granted a hearing it must next be determined if the hearing granted the plaintiff teachers was constitutionally anticeptic within the framework of due process. This Court has previously found no controverted facts to exist as to the hearing procedures utilized by the defendants. The concept of due process is not static nor are its ramifications identical in every situation. The Court in *Arnett* v. *Kennedy* —— U.S.——, 94 S. Ct. 1633, 1645, —— L. Ed. 2nd——(197)—) notes:

> "The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under the clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests.
>
> > 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" (citation omitted)

Thus the principals of due process in the instant case must be tempered by the underlying facts as presented in the affidavits filed in support of and in opposition to the motion for summary judgment. The factual setting involves a strike by the members of the plaintiff class who constituted all but a few teachers then under contract with the Hortonville Joint School District No. 1. The effect of the strike which commenced March 18, 1974, was to completely bring the operations of the school in that district to an immediate and complete halt. By means of substitute teachers the schools resumed operations sporadically after March

25, 1974, until April 2, 1974, when the Board of Education voted to terminate the employment of the plaintiff class. After April 8, 1974, the schools were again opened permanently with the employment of "replacement" teachers. It is within the framework of the foregoing facts that this Court must determine, if it can do so as a matter of law, whether the plaintiff class was accorded due process.

It is undisputed that a letter dated March 23, 1974, was sent to each member of the plaintiff class by the superintendent of the Hortonville Joint District No. 1 advising that the strike was contrary to Sec. 111.70, Stats., and further that: "The School Board can not and will not condone unlawful activity under this statute." The letter, a copy of which has been identified as exhibit "A" and attached to the defendants' affidavit herein concluded by stating: "We regret having to issue this letter, but wanted to make certain that all teachers of the Hortonville School District are fully informed that under State law, teachers' strikes are expressly prohibited."

Next, the record pertinent to the motion for summary judgment states that the members of the plaintiff class were served a notice of disciplinary hearing between March 29 and April 1974, Exhibit "B" attached to the defendants' affidavit in support of the motion for summary judgment accomplished the following purposes:

a) disclosed the precise charge made against the individual teacher—since March 18, 1974, the existence of a breach of the individual employment contract and engagement in an unlawful strike contrary to Wisconsin law

b) identified who made the charge—Superintendent Obry

c) advised of possible disciplinary action—termination of employment contract

d) established specified date, time and place of hearing

e) informed individual teachers of opportunity to present any statement or evidence relevant to the alleged conduct.

The teachers named as plaintiffs in this case and who allege themselves to be representative of the entire class of teachers were served notice not less than two days nor more than three days prior to their scheduled hearing time. Hence the crucial issue with respect to notice is whether such notice under the conditions related above were adequate and timely. In *Goldberg, supra*, the Court held a due process hearing essentially in terminating welfare benefits and stated therein:

> "The fundamental requisite of due process of law is the opportunity to be heard. (citations omitted) The hearing must be at a meaningful time and in a meaningful manner. (citation omitted) In the present context the principals require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. (397 U.S. 267, 268, 90 S. Ct. 1020)

Considering the due process requirements in the case of teacher dismissed during the school year upon a two day notice of hearing and after an oral statement of reasons for a suspension commencing four days prior to the notice of hearing, the Court in *Ahern* v. *Board of Education of School District of Grand Island*, 456 F. 2nd 399, 403 (8th Cir. 1972) stated:

> ". . . she might have been notified with greater precision of the basis for her suspension and dismissal,

> and the time between the notice and the hearing might have been greater, and the school board might have detailed its decision in a formal writing, none of these ideal conditions are prerequisites to a finding that a hearing has been granted which comports with accepted notions of procedural due process. A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (citation omitted)

Applying the foregoing due process standard as set forth in *Goldberg, supra,* and *Arnett, supra,* which were drawn from earlier U.S. Supreme Court decisions cited in *Ahern, supra,* to the case at bar the undisputed facts show an adequate and timely notice to have been given to the plaintiff class under the then existing condition of forced school closings as a result of the prohibited strike. The notice provided by exhibit "B" attached to the defendants' affidavit herein unequivocally stated the precise nature of the charge, its source, the possible consequences as well as the time and manner in which the members of the plaintiff class could refute the charge. Counsel for both parties cited numerous cases involving various fact situation in which notice of a specific duration was deemed constitutionally appropriate. Those cases, however, deal with areas of law most dissimilar to the area of employer-employee relationship in a prohibited strike setting such as the present case. What this Court deems to be adequate and timely notice as a matter of law in the present case is done in the context of the nature of the charge. The plaintiff class either was on strike in violation of Sec. 111.70(4)(1), Stats., or it was not on strike. If the fact was that a strike was in existence as set forth in the defendants' affidavit herein, then there could be no defense to the charge for Sec. 111.-70(4)(1) expressly prohibits strikes in the public employment sector. As this Court has previously held in a ruling on a request by the plaintiffs for temporary injunctive re-

BLEED THROUGH

lief, Wisconsin does not recognize that strikes in the public employment sector are permissible where justified or provoked. If the State law prohibiting public employment strikes was not so express or provided exceptions to the strike prohibition this Court could not readily deem the notice of disciplinary hearing to be timely and adequate as a matter of law. Had the plaintiff class been charged additionally with an indefinite allegation such as misconduct or inefficiency, then the notice in question might very well not be adequate or timely within the concept of due process. Inasmuch as there can be no legal defense to the charge of striking in violation of Sec. 111.70(4)(1) of the Wisconsin Statutes this Court cannot foresee the need of a notice of longer duration in order to defend against such charge. Simply, the plaintiff class either was or was not on strike.

As noted earlier in this decision there is no controversy in the fact that the Hortonville Board of Education sat as the decision maker, that the plaintiffs were prohibited from adversely examining various members of the Board of Education and that counsel for the Board of Education acted in the dual capacity of adviser and prosecutor. As a matter of law these factors do not constitute a deprivation of due process.

Numerous U.S. Supreme Court decisions do require the decision-maker in a due process setting to be impartial. But again due process must be viewed within the framework of the setting of the present case. Sec. 118.22, Stats., provides in pertinent part:

> "No teacher may be employed or dismissed except by a majority vote by a full membership of the board."

Thus no one but the Board of Education could by State law make the decision which ultimately was made to dis-

charge the teachers. Then too, the charge of striking in violation of State Statute was the sole charge before the Board of Education; this is not a situation similar to charges of misconduct of inefficiency where it would be necessary for the decision-maker to judge the credibility of witnesses and weigh the evidence. The uncontroverted fact in the situation is that a strike existed and therefore the degree of impartiality which may have been required in other settings was not necessary to adjudicate the single fact involved in this case. In that connection it must be noted further that the plaintiff class has not claimed to have been discharged for any constitutionally impermissible reason.

With respect to the denial of the opportunity to adversely examine various members of the Hortonville Board of Education it must first be pointed out that it was Superintendent Marvin Obry and not any member of the Board of Education who charged the plaintiffs with striking. In a due process setting it is necessary that there be afforded an opportunity to confront and cross-examine adverse witnesses. *Goldberg, supra; Greene* v. *McElroy*, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2nd 1377 (1959). The members of the Hortonville Board of Education on the uncontroverted facts were not adverse witnesses. The purpose of the plaintiffs' attempt to adversely examine the board members was stated at the April 1, 1974, hearing which was reported and the transcript thereof incorporated in the defense affidavit in support of the motion for summary judgment. Plaintiffs' counsel at that hearing was asked to indicate the nature of the evidence he wished to present and he responded in this fashion:

> "Yes, it goes to bargaining here, and I have some questions of some of the Board members." (P. 28 of transcript)

Thereafter plaintiffs' counsel made an offer of proof confined solely to the bargaining issues. Clearly, the purpose of adversely examining the board members was not directed to the charge of striking but to facts involving negotiations on a variety of issues in the labor dispute; the purpose was to justify the strike which this Court has deemed legally impossible. The denial of adverse examination of various board members in this context was proper.

Considering the dual capacity of the Board of Education's counsel as adviser and prosecutor this Court finds no such constitutional prohibition. The citations presented to this Court by the plaintiffs deal with economic or personal conflicting interests of the decision maker. In this situation the capacities of adviser and prosecutor are not constitutionally incompatible.

Also uncontroverted are the contents of the transcript of the April 1, 1974, hearing and the termination notice both of which were incorporated by reference in the defendants' affidavit in support of the motion for summary judgment. The transcript of the April 1, 1974, hearing contains the following statement of plaintiffs' counsel:

> "We have already indicated, everybody got the same form, and they are all charged with the same thing. They have consulted and conferred among themselves and concurred that *they have done or not done the same things, all of which would be within the knowledge of the management. . . .*" (P. 22 of transcript, emphasis added)

The plaintiff class whose members had individual hearings scheduled for the morning of April 1, 1974, had their hearings called. Their attorney who was present advised the Board of Education that no individual member of the plaintiff class would answer any question or participate on

an individual basis. Thereafter all members of the plaintiff class then represented by counsel on an individual basis, eighty-two in number, advised the Board through counsel that they desired one mass hearing instead of individual hearings as had been scheduled; further they advised through counsel that they would not respond to any questions put to them by the Board on an individual basis. The same procedure was followed on a subsequent date for members of the plaintiff class not represented by counsel on April 1, 1974.

In a statement to the Board at the April 1, 1974, hearing plaintiffs' counsel advised that the eighty-two individuals he then represented discussed the only inference the Board stated it would draw from the plaintiffs' refusal to answer questions individually, namely, that the plaintiffs were "engaged in a work stoppage." (P. 24 of transcript) Plaintiffs' counsel only objected to any legal conclusions being drawn from such factual inference. Whereupon the Board of Education rested and the plaintiffs as a body attempted to adversely examine some members of the Board and made an offer of proof as was discussed above in connection with collective bargaining issues.

Also discussed earlier in this decision was the contents of the notice of termination dated April 2, 1974. The notice of termination in brief, informed the plaintiff class that they had been found guilty of the conduct charged in the notice of hearing dated March 29, 1974, namely, having since March 18, 1974, breached their individual employment contracts and engaging in strike activity contrary to Wisconsin law.

The purpose of disclosing the evidentiary basis in a due process setting was stated in *Green* v. *McElroy, supra*:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that

> where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual *so that he has an opportunity to show that it is untrue.* (emphasis added) (360 U.S. 496, 79 S. Ct. 1413)

In the instant situation the plaintiff class knew the Board of Education had before it the information of Superintendent Obry that the teachers were on strike as noted in the notice for disciplinary hearings dated March 29, 1974. Also the plaintiff class knew, by means of a letter sent to them under the date of March 23, 1974, a copy of which was marked exhibit "A" and is attached to the defendants' affidavit in support of the motion for summary judgment, that the Board of Education had personal knowledge of the existing strike. As stated by plaintiffs' counsel at the April 1, 1974, hearing referring to the plaintiff class:

> ". . . they have done or not done the same things, all of which would be within the knowledge of the management. . . ." (P. 22 of transcript)

Thus in the present setting it would be superfluous for anyone to state on the record that the plaintiff class was engaged in a strike. The plaintiff class was warned that their refusal to answer questions would result in an inference that they were "engaged in a work stoppage" in violation of their individual employment contracts and in violation of State law. Subsequently, the April 2, 1974, termination notice advised the plaintiff class that the members were found guilty of the conduct alleged in the notice of disciplinary hearing, that is, striking in violation of their individual employment contracts and State law. The applicable constitutional test is not what was the evidence adduced at the hearing or detailed in the termina-

tion notice, but rather was the basis of the Board of Education's case sufficiently disclosed so that the plaintiff class could show the evidence to be untrue.

The plaintiff class was sufficiently informed of the charges and their source so as to have a meaningful opportunity to defend themselves and decide if they had been discharged for constitutionally impermissible reasons. There are no other reasonable inferences or conclusions to be drawn from the uncontroverted facts. Therefore this Court finds the evidence considered by the Board as disclosed to the plaintiffs was sufficient to accord them due process as a matter of law in this particular setting.

With respect to lack of prior notice to the Hortonville Education Association in any of the procedures utilized by the Board of Education this Court finds no duty to afford the Hortonville Education Association with due process inasmuch as the contracts involved were those of individual teachers who were individually given notice and individually provided an opportunity for an individual hearing on their individual participation in the strike. As a practical matter, the Hortonville Education Association membership constituted the plaintiff class and the Association did appear at the April 1, 1974, disciplinary hearings. The interests of property and liberty involved here were those of the individual teachers, not the Hortonville Education Asociation. If the Hortonville Education Association was entitled to due process for considerations other than due process, remedies in another forum are available.

Perhaps the most volitable issue in this entire factual setting is the allegation that the defendants conspired to deny the plaintiff class of due process. However, this

Court having found no due process violations to exist within the context of this motion for summary judgment, the Court deems it unnecessary to discuss this issue further.

SUMMARY

Upon consideration of the defendants' affidavit in support of the motion for summary judgment together with the attached and incorporated documents this Court deems the defendants to have made a prima facie case.

After consideration of the plaintiffs' affidavit in opposition to the motion for summary judgment the Court deems that no material controverted facts exist.

There being no evidentiary facts in the affidavits from which reasonable but different inferences could be drawn, this Court can only conclude that although the plaintiffs have stated a cause of action such cause of action is factually unsupportable.

In addition, this Court finds as a matter of law:

1. The strike which commenced March 18, 1974, did not *per se* sever the relationship of employer-employee between the plaintiff teachers the defendant Hortonville Joint School No. 1;

2. The plaintiff teachers in spite of a strike in violation of Sec. 111.70(4) (1), Stats., were entitled to due process procedures to protect their property and liberty interests; and

3. The plaintiff teachers were duly accorded due process as required by the 14th Amendment of the Constitution of the United States and Article 1 of the Constitution of the State of Wisconsin.

Therefore, the defendants' motion for summary judgment must be granted. Counsel for the defendants are directed to prepare an order consistent with the foregoing decision and present the same to this Court for signature within fifteen (15) days from today, after obtaining approval of plaintiffs' counsel as to form.

Dated: July 19, 1974

By THE COURT

/s/ ALLAN J. DEEHR
Circuit Judge

BLEED THROUGH

111.70 (4)(l) *Strikes prohibited.* Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employe and such strikes are hereby expressly prohibited.

111.70(4)(jm) *Binding arbitration, Milwaukee.* This paragraph shall apply only to members of a police department employed by cities of the 1st class. If the representative of members of the police department, as determined under par. (d), and representatives of the city reach an impasse on the terms of the agreement, the dispute shall be resolved in the following manner:

1. Either the representative of the members of the police department or the representative of the city may petition the commission for appointment of an arbitrator to determine the terms of the agreement relating to the wages, hours and working conditions of the members of the police department.

2. The commission shall conduct a hearing on the petition, and upon a determination that the parties have reached an impasse on matters relating to wages, hours and conditions of employment on which there is no mutual agreement, the commission shall appoint an arbitrator to determine those terms of the agreement on which there is no mutual agreement. The commission may appoint any person it deems qualified, except that the arbitrator may not be a resident of the city which is party to the dispute.

3. Within 14 days of his appointment, the arbitrator shall conduct a hearing to determine the terms of the agreement relating to wages, hours and working conditions. The arbitrator may subpoena witnesses at the request of either party or on his own motion. All testimony shall be given under oath. The arbitrator shall take judicial notice of all

economic and social data presented by the parties which is relevant to the wages, hours and working conditions of the police department members. The other party shall have an opportunity to examine and respond to such data. The rules of evidence applicable to a contested case, as defined in s. 227.01 (2), shall apply to the hearing before the arbitrator.

4. In determining those terms of the agreement on which there is no mutual agreement and on which the parties have negotiated to impasse, as determined by the commission, the arbitrator, without restriction because of enumeration, shall have the power to:

a. Set all items of compensation, including base wages, longevity pay, health, accident and disability insurance programs, pension programs, including amount of pension, relative contributions, and all eligibility conditions, the terms and conditions of overtime compensation, vacation pay, and vacation eligibility, sickness pay amounts, and sickness pay eligibility, life insurance, uniform allowances and any other similar item of compensation.

b. Determine regular hours of work, what activities shall constitute overtime work and all standards and criteria for the assignment and scheduling of work.

c. Determine a seniority system, and how seniority shall affect wages, hours and working conditions.

d. Determine a promotional program.

e. Determine criteria for merit increases in compensation and the procedures for applying such criteria.

f. Determine all work rules affecting the members of the police department, except those work rules created by law.

BLEED THROUGH

g. Establish any educational program for the members of the police department deemed appropriate, together with a mechanism for financing the program.

h. Establish a system for resolving all disputes under the agreement, including final and binding 3rd party arbitration.

i. Determine the duration of the agreement and the members of the department to which it shall apply.

5. In determining the proper compensation to be received by members of the department under subd. 4, the arbitrator shall utilize:

a. The most recently published U.S. bureau of labor statistics "Standards of Living Budgets for Urban Families, Moderate and Higher Level", as a guideline to determine the compensation necessary for members to enjoy a standard of living commensurate with their needs, abilities and responsibilities; and

b. Increases in the cost of living as measured by the average annual increases in the U.S. bureau of labor statistics "Consumer Price Index" since the last adjustment in compensation for those members.

6. In determining all noncompensatory working conditions and relationships under subd. 4, including methods for resolving disputes under the labor agreement, the arbitrator shall consider the patterns of employe-employer relationships generally prevailing between technical and professional employes and their employers in both the private and public sectors of the economy where those relationships have been established by a labor agreement between the representative of those employes and their employer.

7. All subjects described in subd. 4 shall be negotiable between the representative of the members of the police department and the city.

8. Within 30 days after the close of the hearing, the arbitrator shall issue a written decision determining the terms of the agreement between the parties which were not the subject of mutual agreement and on which the parties negotiated in good faith to impasse, as determined by the commission, and which were the subject of the hearing under this paragraph. The arbitrator shall state reasons for each determination. Each proposition or fact accepted by the arbitrator must be established by a preponderance of the evidence.

9. Subject to subds. 11 and 12, within 14 days of the arbitrator's decision, the parties shall reduce to writing the total agreement composed of those items mutually agreed to between the parties and the determinations of the arbitrator. The document shall be signed by the arbitrator and the parties, unless either party seeks judicial review of the determination pursuant to subd. 11.

10. All costs of the arbitration hearing, including the arbitrator's fee, shall be borne equally by the parties.

11. Within 60 days of the arbitrator's decision, either party may petition the circuit court for Dane county to set aside or enforce the arbitrator's decision. If the decision was within the subject matter jurisdiction of the arbitrator as set forth in subd. 4, the court must enforce the decision, unless the court finds by a clear preponderance of the evidence that the decision was procured by fraud, bribery or collusion. The court may not review the sufficiency of the evidence supporting the arbitrator's determination of the terms of the agreement.

12. Within 30 days of a final court judgment, the parties shall reduce the agreement to writing and with the arbitrator execute the agreement pursuant to subd. 9.

13. Subsequent to the filing of a petition before the commission pursuant to subd. 1 and prior to the execution

BLEED THROUGH

of an agreement pursuant to subd. 9, neither party may unilaterally alter any term of the wages, hours and working conditions of the members of the police department.

111.77. *Settlement of disputes in collective bargaining units composed of law enforcement personnel and firefighters.* In fire departments and city and county law enforcement agencies municipal employers and employes have the duty to bargain collectively in good faith including the duty to refrain from strikes or lockouts and to comply with the procedures set forth below:

(1) If a contract is in effect, the duty to bargain collectively means that a party to such contract shall not terminate or modify such contract unless the party desiring such termination or modification:

(a) Serves written notice upon the other party to the contract of the proposed termination or modification 180 days prior to the expiration date thereof or, if the contract contains no expiration date, 60 days prior to the time it is proposed to make such termination or modification. This paragraph shall not apply to negotiations initiated or occurring in 1971.

(b) Offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications.

(c) Notifies the commission within 90 days after the notice provided for in par. (a) of the existence of a dispute.

(d) Continues in full force and effect without resorting to strike or lockout all terms and conditions of the existing contract for a period of 60 days after such notice is given or until the expiration date of the contract, whichever occurs later.

(e) Participates in mediation sessions by the commission or its representatives if specifically requested to do so by the commission.

(f) Participates in procedures, including binding arbitration, agreed to between the parties.

(2) If there has never been a contract in effect, the union shall notify the commission within 30 days after the first demand upon the employer of the existence of a dispute provided no agreement is reached by that time, and in such case sub. (1)(b), (e) and (f) shall apply.

(3) Where the parties have no procedures for disposition of a dispute and an impasse has been reached, either party may petition the commission to initiate compulsory, final and binding arbitration of the dispute. If in determining whether an impasse has been reached the commission finds that any of the procedures set forth in sub. (1) have not been complied with and that compliances would tend to result in a settlement, it may require such compliance as a prerequisite to ordering arbitration. If after such procedures have been complied with or the commission has determined that compliance would not be productive of a settlement and the commission determines that an impasse has been reached, it shall issue an order requiring arbitration. The commission shall in connection with the order for arbitration submit a panel of 5 arbitrators from which the parties may alternately strike names until a single name is left, who shall be appointed by the commission as arbitrator, whose expenses shall be shared equally between the parties.

(4) There shall be 2 alternative forms of arbitration:

(a) *Form 1.* The arbitrator shall have the power to determine all issues in dispute involving wages, hours and conditions of employment.

BLEED THROUGH

(b) *Form 2.* Parties shall submit their final offer in effect at the time that the petition for final and binding arbitration was filed. Either party may amend its final offer within 5 days of the date of the hearing. The arbitrator shall select the final offer of one of the parties and shall issue an award incorporating that offer without modification.

(5) The proceedings shall be pursuant to form 2 unless the parties shall agree prior to the hearing that form 1 shall control.

(6) In reaching a decision the arbitrator shall give weight to the following factors:

(a) The lawful authority of the employer.

(b) Stipulations of the parties.

(c) The interests and welfare of the public and the financial ability of the unit of government to meet these costs.

(d) Comparison of the wages, hours and conditions of employment of the employes involved in the arbitration proceeding with the wages, hours and conditions of employment of other employes performing similar services and with other employes generally:

1. In public employment in comparable communities.

2. In private employment in comparable communities.

(e) The average consumer prices for goods and services, commonly known as the cost of living.

(f) The overall compensation presently received by the employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(g) Changes in any of the foregoing circumstances dur ing the pendency of the arbitration proceedings.

(h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

(7) Proceedings, except as specifically provided in this section, shall be governed by ch. 298.

(8) This section shall not apply to cities having a population of 500,000 or more nor to cities, villages or towns having a population of less than 2,500.

(9) Section 111.70(4)(c) 3 shall not apply to employments covered by this section.

62.13(5)(i):

(i) Any person suspended, reduced, suspended and reduced, or removed by the board may appeal from the order of the board to the circuit court by serving written notice thereof on the secretary of the board within 10 days after the order is filed. Within 5 days thereafter the board shall certify to the clerk of the circuit court the record of the proceedings, including all documents, testimony and minutes. The action shall then be at issue and shall have precedence over any other cause of a different nature pending in said court, which shall always be open to the trial thereof. The court shall upon application of the accused or of the board fix a date of trial, which shall not be later than 15 days after such application except by agreement. The trial shall be by the court and upon the return of the board, except that the court may require further return or the taking and return of further evidence

BLEED THROUGH

by the board. The question to be determined by the court shall be: Upon the evidence was the order of the board reasonable? No costs shall be allowed either party and the clerk's fees shall be paid by the city. If the order of the board is reversed, the accused shall be forthwith reinstated and entitled to his pay as though in continuous service. If the order of the board is sustained it shall be final and conclusive.

JUL 28 1975

MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1638

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Conditional Cross-Petitioners,

v.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Respondents.

On Conditional Cross-Petition For Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF FOR RESPONDENTS IN OPPOSITION

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BLEED THROUGH

TABLE OF CONTENTS

	Page
Statement of the Case	2
Argument:	
I. The Conditional Cross-Petition Raises No Substantial Federal Question Except That *Morrissey* Was Seriously Misconstrued	3
II. No Substantial Unresolved Federal Question Is Presented By Conditional Cross-Petitioners' Equal Protection Claim	9
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Armstrong v. Monzo, 380 U.S. 545, 552 (1965) 8
Dandridge v. Williams, 397 U.S. 471, 486 (1970) .. 10
Goss v. Lopez, 43 U.S.L.W. 4181 (Jan. 22, 1975) ... 8
McGinnis v. Royster, 410 U.S. 263, 276 (1973) 9
Morrissey v. Brewer, 408 U.S. 471 (1972) 4, 5, 6, 7, 8
Rockwell v. Crestwood School Dist., — Mich. —, 227 N.W.2d 736 (1975) 7
United Federation of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C. 1971) 10
Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) 10
Withrow v. Larkin, 43 U.S.L.W. 4459 (April 16, (1975) 7

BLEED THROUGH

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Respondents.

On Conditional Cross-Petition For
Writ of Certiorari to the Supreme Court
of the State of Wisconsin

BRIEF FOR RESPONDENTS IN OPPOSITION

The cross-petitioners have not sought independent review of the decision below, but have filed a cross-petition for certiorari asking that certain issues be considered only in the event certiorari is granted petitioners in No. 74-1606, who are Respondents, here. Respondents oppose the conditional cross-petition on the grounds that it presents no unresolved federal question except the question for which review is sought in No. 1606.

STATEMENT OF THE CASE

An accurate statement of the case appears in the Petition for a Writ of Certiorari in No. 74-1606. Conditional cross-petitioners' statement confuses the holding below. Only one aspect of the procedure followed by the school board was at issue below: "the lack of an impartial decisionmaker." (p. App. 21)* The holding was:

> "The board was the collective bargaining agent for the school district and thus was engaged in the collective bargaining process with the teachers' representative, the HEA. It is not difficult to imagine the frustration on the part of the board members when negotiations broke down, agreement could not be reached and the employees resorted to concerted activity. This is not to suggest, of course, that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited budget. They were, however, not uninvolved in the events which precipitated decisions they were required to make. The decision to discharge was possibly a convenient alternative which would eliminate their labor

*References are to the Wisconsin Supreme Court's opinion. Pagination is to the appendix to the Conditional Cross-Petition for a Writ of Certiorari.

BLEED THROUGH

> problems in one fell swoop. We conclude that the board was not an impartial decisionmaker in a constitutional sense and that the appellants were denied due process of law." (p. App. 23-24)

The Wisconsin Supreme Court held that the discharged teachers were entitled to bring an action for a determination whether "a more reasonable response" could have been made than terminating the illegally striking teachers. (p. App. 10-11, 26). The Wisconsin Court did not hold that the discharges were not reasonable.

ARGUMENT

I.

THE CONDITIONAL CROSS-PETITION RAISES NO SUBSTANTIAL FEDERAL QUESTION EXCEPT THAT *MORRISSEY* WAS SERIOUSLY MISCONSTRUED.

On the due process issue conditional cross-petitioners seek review only of the remedy fashioned by the Wisconsin Supreme Court.

> "We believe the school board should make the initial determination as to the hiring or firing of one or many teachers. In those situations where due process is required, namely where the employed teacher's property right or liberty is at stake—notice, a hearing and a statement of reasons should be given. As much control as possible should be left with the school board to set policy and manage the school.
>
> "In those situations where an employed teacher is discharged or otherwise disciplined and due process is required, and the school board is in an adversary position, we hereby provide and direct that the dissatisfied teacher or teachers can, upon petition, ob-

> tain a *de novo* determination of all issues in any court of record in the county where the school district or a part of it is located. . . .
>
> . . . .
>
> "This method of disposition is not ideal because a court may be required to make public policy decisions that are better left to a legislative or administrative body."

The above procedure is the act of the highest court of the State of Wisconsin taken under state constitutional provisions. Conditional cross-petitioners recognize that they are not entitled to review of that state law question in this Court. Thus, it is argued that the ordered procedure constitutes denial of due process because it does not void the board's initial action and order reinstatement with backpay effective April 5, 1974. (Conditional Cross-Petition, p. 16). Acceptance of conditional cross-petitioners' argument invalidates the procedure created by the Wisconsin Supreme Court.[1] Conditional cross-petitioners' claim that due process is denied unless they are reinstated with backpay from April 5, 1974, underscores the Wisconsin Supreme Court's serious misconstruction of *Morrissey v. Brewer*, 408 U.S. 471 (1972). Petitioners' argument as-

[1]The present Wisconsin Supreme Court decision prevents the replacement of illegally striking teachers, apparently until a trial-type hearing involving the preparation, presentation and evaluation of everything that was considered or discussed by either side in negotiations occurs. Such a proceeding at the least would be expensive and time consuming. Meanwhile, the children cannot go to school. The proceeding before the state court is a stopgap measure. The Court's decision actually requires the legislature to create yet another government agency. The agency's budget would be staggering. Teacher contract negotiations normally occur simultaneously throughout the state because of uniform budget deadlines. A large staff would be necessary just to handle teachers, not considering all other public employees. Delay is unavoidable if trial-type procedures are used. Again the schools would remain closed pending litigation of all conduct at negotiations.

BLEED THROUGH

sumes, as did the Wisconsin Supreme Court, that *Morrissey* required a decision-maker other than the school board at any pretermination hearing. From that premise it is urged that the board's action in terminating the illegally striking teachers in order to reopen the schools with replacement teachers is void. The argument then leaps to a demand for reinstatement and backpay on the assertion that a post-termination review of the board's action fails to accord a hearing at a "meaningful time." (p. 15-16, Conditional Cross-Petition)

Morrissey v. Brewer does not determine how to balance the interests of the community in educating their children against the interests of the illegally striking teachers in an expanded procedure.

By retaining the board's involvement in the new procedure the Wisconsin Court can only have meant that the state's interest in a reasonably efficient procedure overbalanced the affected individuals' interest in a panoply of procedural rights that includes a decisionmaker which is not accountable to the taxpayers and parents of the school district.

The teachers' interest in adjudicative procedures is to insure that there is not an incorrect determination of the facts, *i.e.* whether they are striking. Here it was admitted that an illegal strike was occurring, each teacher was asked twice to return to work, (p. App. 2-3) and then a hearing was held. The risk of an erroneous decision was negligible.

The mistaken reliance on *Morrissey* stems from conditional cross-petitioners' semantics. The terminations are labeled punitive by cross-petitioners. By using the label, "punitive", teachers seek to separate the termination from the fact that at the time of the terminations, the schools

were closed because of the strike. The teachers were *not* terminated *after* they returned to work.[2] The termination resulted from the current and future conduct of refusing to work. *Morrissey* involves a parolee being punished for *prior* conduct. This Court's concern was that parolee have an opportunity to show the facts surrounding his prior conduct that might possibly warrant mitigating parole revocation.

In providing for an opportunity to show the mitigating facts traditionally involved in criminal proceedings in *Morrissey*, we doubt that this Court meant to invite the situation presented here. The teachers made no attempt to mitigate their unlawful conduct. Twice before the hearing the teachers were invited to return to work. They refused. They refused again at the hearing. They were still on strike a week later though aware that the school board was trying to reopen the schools by hiring replacements. (p. App. 5, n. 2). Nothing in *Morrissey* can be read as approving a parolee's knowing and continued parol violations.

The mitigating circumstances envisioned in *Morrissey* are such facts as show that the parolee, knowing that specified conduct is inconsistent with his parole and having control over that conduct, would not continue to or again violate his parole. This Court in *Morrissey* did not indicate that the parole board, which approved the release and established the parole conditions, was prohibited by procedural due process from evaluating such evidence. The parole board's role as decisionmaker was expressly

[2]The trial court found the teachers to be illegally striking on April 11, 1974, a week after this action was started. (p. A-77.) (Reference is to the Circuit Court decision on conditional cross-petitioners' application for a temporary restraining order. Reprinted in the appendix to the Petition for a Writ of Certiorari in No. 1606.)

BLEED THROUGH

approved. Nothing in *Morrissey* even suggests that the parolee's procedural due process rights include a decisionmaker unassociated and uninvolved with the parole system or that the parolee is constitutionally entitled to a decisionmaker who is not accountable for representing the interests of the parol system. See *Withrow v. Larkin*, 43 U.S.L.W. 4459 (April 16, 1975).

In this case the court below, and conditional cross-petitioners here, erroneously read *Morrissey* as requiring a decisionmaker who is not accountable (by election) to the taxpayers, parents and children of the school district. Such intimations were deliberately avoided by this Court in *Morrissey*. The same due process attack on the right of a school board to terminate illegally striking teachers was rejected by the Supreme Court of Michigan. *Rockwell v. Board of Education of Crestwood School Dist.*, 393 Mich. 616, 227 N.W.2d 736 (1975).

The remedy fashioned by the Wisconsin Supreme Court demonstrates that *Morrissey* was misconstrued. Having held that *Morrissey* meant the school board was a constitutionally defective decisionmaker, the court nonetheless refused to entirely exclude the school board from the initial decision because:

> "When the teachers went on strike, the school board was undoubtedly faced with a situation that needed immediate attention. Clearly, it had a duty to keep the schools open and staff them with competent teachers. If the schools were closed so that the statutory minimum number of school days was not reached, monetary state school aid would have been denied or jeopardized leading to a severe budget crisis."

The above is simply a frank recognition that the school

board's interest in educating the children, with replacement teachers if necessary, is more important than the interest of illegally striking teachers in protecting a property interest that they voluntarily chose to forego.

Having misread *Morrissey* and unnecessarily circumscribed the discretion of the school board, but recognizing the importance of the governmental interest at stake, the Court below could only accommodate the resulting inconsistency by remanding to the trial court to determine if a "more reasonable" course of action could have been followed. Without the mistaken interpretation of *Morrissey*, this suit would be at an end and the court-legislated procedure would be unnecessary.

Finally, assuming *arguendo* that the result reached by applying *Morrissey* is correct, conditional cross-petitioners have not been denied due process of law. Restoration of the *status quo* of April 5, 1974, has no bearing on the opportunity for a hearing "at a meaningful time and in a meaningful manner." *Armstrong v. Monzo*, 380 U.S. 545, 552 (1965).

On April 5, 1974, conditional cross-petitioners were on strike. They were not being paid because they were refusing to work. They are still on strike, since there has been no unconditional offer to return to work. Restoration of the status quo could be restoration of an illegal strike and closed schools. It's not clear that conditional cross-petitioners are in any way harmed by nonreinstatement, much less that they are irreparably harmed. Procedural due process does not mean that to protect conditional cross-petitioners from the negligible possibility that their termination was illegal, the children of the school district are again to have their education interrupted. *Cf. Goss v. Lopez*, 43 U.S.L.W. 4181 (Jan. 22, 1975).

BLEED THROUGH

II.

NO SUBSTANTIAL UNRESOLVED FEDERAL QUESTION IS PRESENTED BY CONDITIONAL CROSS-PETITIONERS' EQUAL PROTECTION CLAIM.

Conditional cross-petitioners also seek review of the Wisconsin Supreme Court's holding that public employees, including teachers, are not denied equal protection *vis a vis* other public employees because the statutory collective bargaining rights accorded such employees do not include the right to invoke compulsory arbitration, which is available to police and fire personnel.

Conditional cross-petitioners concede that the more intimate connection to public health, safety and welfare of police and fire personnel:

> "might create a rational relationship between the classification of police and firemen separately from other public employees and the object sought to be achieved, that is the safety and health of the citizens." (Conditional Cross-Petition, p. 20).

A legislature could rationally conclude that unlawful strikes by police and fire personnel pose a greater danger to public health, safety and welfare than other public employee strikes. Providing a compulsory dispute resolution procedure in the interest of avoiding that greater harm to the public is hardly irrational or arbitrary. Where a fundamental right[3] or suspect classification is not involved, a classification that is not irrational or arbitrary does not violate the equal protection clause. *E.g. McGinnis v. Roy-*

[3]That the right to strike is not a fundamental interest has been settled. *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C. 1971), *affirmed*, 404 U.S. 802 (1971).

ster, 410 U.S. 263, 276 (1973). Also, a legislature may address a problem one step at a time or even select one phase of a field and apply a remedy there, neglecting the others. *Dandridge v. Williams,* 397 U.S. 471, 486 (1970); *Williamson v. Lee Optical Co.,* 348 U.S. 483, 488 (1955).

To say that the public health, safety and welfare would be immediately and irreparably harmed by a strike of police and fire personnel is not to say, as conditional cross-petitioners assert, that strikes by other public employees have no serious impact on public health, safety and welfare. Further, the proposition that prohibiting public employees, whether "essential" or "nonessential," from striking denies them equal protection has been uniformly rejected by numerous state and federal courts, as well as this Court. See Annot., 37 A.L.R.3d 1147 (1971); *United Federation of Postal Clerks v. Blount, supra.*

CONCLUSION

The due process question presented by this conditional cross-petition emphasizes the incorrectness of the Wisconsin Supreme Court's resolution of the due process claim and the harm that decision causes. Nor does this cross-petition present a federal equal protection question warranting this Court's attention.

July, 1975.

Respectfully submitted,

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